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United States
Circuit Court of Appeals
For the Ninth Circuit

J. A. CZIZEK,

Plaintiff in Error,

VS.

WESTERN UNION TELEGRAPH COMPANY, a
Corporation,

Defendant in Error.

Transcript of the Record

FILED

AUG 24 1920

F. D. MONCKTON,
CLERK

*Upon Writ of Error from the United States District
Court for the District of Idaho, Southern Division*

No.-----

United States
Circuit Court of Appeals
For the Ninth Circuit

J. A. CZIZEK,

Plaintiff in Error,

VS.

WESTERN UNION TELEGRAPH COMPANY, a
Corporation,

Defendant in Error.

Transcript of the Record

*Upon Writ of Error from the United States District
Court for the District of Idaho, Southern Division*

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

RICHARD H. JOHNSON,
Boise, Idaho.
Attorney for Plaintiff in Error.

RICHARDS & HAGA,
Boise, Idaho.
Attorneys for Defendant in Error.

*In the District Court of the Third Judicial District
of the State of Idaho, in and for the County of Ada*

J. A. CZIZEK,

Plaintiff,

VS.

THE WESTERN UNION TELEGRAPH COM-
PANY, a Corporation,

Defendant.

COMPLAINT

The above named plaintiff, complaining of the
above named defendant, avers:

I

That the defendant is, and at the several times
hereinafter mentioned was, a corporation duly or-
ganized under and by virtue of the Laws of the State
of New York, and is now, and was at all such times,
engaged in the business of a common carrier of
messages by telegraph, for hire, and owned and
operated wire connections between the cities of Boise,
Idaho, and Oakland, California, and was engaged
in transmitting telegraph messages for hire between
said cities.

II

That on the 30th day of November, 1917, and for
some time prior thereto, and ever since, said date,
plaintiff was and is the owner of fifty shares of the
capital stock of the Idaho National Bank, a corpora-
tion organized under the National banking laws of
the United States, with its principal place of busi-
ness at Boise, Idaho, which said shares of stock were
of the par value of \$100.00 per share.

III

That during the latter part of October, 1917, plaintiff, while at Boise, Idaho, received information that one David Miller might desire at some future time to purchase as much of the outstanding stock in said Idaho National Bank as he could obtain, for the purpose of effecting a consolidation of said bank with the Pasific National Bank of Boise, Idaho. That the plaintiff desired to sell his said fifty shares of stock and was then about to leave Boise for his home in Oakland, California. That prior to his departure for California, and early in the month of November, 1917, plaintiff had an oral understanding with one T. J. Jones, who resides at Boise, Idaho, and who was also an owner of stock in said Idaho National Bank, and who also desired to sell his stock, which understanding was that plaintiff and said Jones should endeavor to sell their said stock jointly, and that said Jones should notify plaintiff at his home in Oakland, California, whenever said Miller was ready to purchase their said stock.

IV

That a short time thereafter and early in the month of November, 1917, plaintiff went from Boise to his home at 5767 Shafter Avenue, Oakland, California, where he remained from early in November, 1917, until his return to Boise about the middle of February, 1918.

V

That on the 30th day of November, 1917, said T. J. Jones, acting under the arrangement with

plaintiff, set forth in Paragraph III hereof, presented to the defendant, at its office in Boise, Idaho, a certain message which was typewritten upon one of the defendant's telegraph blanks, supplied by defendant for that purpose, which message was in words and figures, as follows, to-wit:

"November 30, 1917.

"J. A. CZIZEK,
5767 Shafter Avenue,
Oakland, Calif.

"Miller advised Idaho National sold to Pacific offers me ninety dollars per share, otherwise wait year and chances of liquidation says if fails to get two-thirds stock liquidation will follow Will you take ninety dollars per share for yours. I am inclined to accept offer for mine.

Answer.

T. J. JONES."

That said defendant received and accepted said message and became thereby obligated to forward the same by telegraph to plaintiff in Oakland, California, and in consideration thereof, said T. J. Jones paid to the defendant the regular toll or charge for transmitting said message, amounting to sixty-five cents.

VI

That on account of the gross negligence of the defendant said message was never transmitted by defendant to plaintiff, and was consequently never received by plaintiff.

VII

That said T. J. Jones, by reason of his not receiving a reply from plaintiff to said message, made sev-

eral inquiries of defendant at its office in Boise, Idaho, between said 30th day of November and the 4th day of December, 1917, as to whether said message had been sent to plaintiff, and was informed by defendant that said message had been sent by defendant to plaintiff and had been delivered to plaintiff on December 1, 1917.

VIII

That said T. J. Jones relied upon and believed said statements of defendant that it had sent said message and delivered it to plaintiff on December 1, 1917, and concluded that plaintiff was on his way to Boise.

That said David Miller then had the money with him at Boise, Idaho, for the purchase of said bank stock of plaintiff and said T. J. Jones, and on or about the 4th day of December, 1917, said T. J. Jones sold his said bank stock to said David Miller for the sum of ninety dollars per share. That said David Miller was then ready and willing to buy plaintiff's fifty shares of said stock and to pay therefor the sum of Forty-five Hundred Dollars, and plaintiff was ready and willing to sell the same for that amount, and except for the gross negligence of defendant in failing to transmit said message to plaintiff, the plaintiff would have then sold his entire fifty shares of stock to said David Miller, and would have received therefor the sum of \$4500.00.

IX

That plaintiff was not informed that said message had been delivered to defendant to be sent to him,

until his return to Boise, Idaho, from Oakland, California, about the middle of February, 1918, and immediately upon learning such fact, plaintiff, accompanied by said T. J. Jones, called at the defendant's office in Boise, Idaho, and was informed that said message had never been sent to plaintiff, and the original message which was delivered by said T. J. Jones to defendant, on November 30, 1917, was then delivered by defendant to plaintiff.

X

That on or about the 15th day of February, 1918, said T. J. Jones received from defendant a letter, in words and figures as follows, to-wit:

"THE WESTERN UNION TELEGRAPH COMPANY,
(Incorporated), Manager's Office.

"Boise, Ida., Feb. 14, 1918.

"T. J. Jones, Atty at Law,

"Boise, Idaho.

"Dear Sir:

"I find on investigation that the message you filed with us on Nov. 30th, 1917, addressed to J. A. Czizek, Oakland, failed in transmission.

"The employees concerned in the failure will be vigorously disciplined.

"I am sure it is unnecessary for me to say the unfortunate occurrence and any inconvenience it may have caused are very much regretted, and, in accordance with our custom in such cases, I enclose herewith the amount paid as tolls.

Yours truly,

"G. H. HACKETT,
Manager."

That said letter contained a check for said sixty-five cents tolls paid by said T. J. Jones for transmitting said message, which said check was not accepted by said Jones or by plaintiff, but was returned by them to defendant.

XI

That ever since the time plaintiff first learned that said message had been delivered to defendant, to be sent to him, to-wit: about the middle of February, 1918, his said bank stock has had no market value whatever, for the reason that said Idaho National Bank went into liquidation and is no longer operating as a bank and its assets are being applied to the payment of its outstanding debts.

That plaintiff is informed and believes, and therefore alleges upon information and belief, that the assets of said bank will not be greater in value than the said indebtedness, and that nothing will be available for the stockholders of said bank when such liquidation is closed.

XII

That by reason of the failure of defendant to transmit said message to him, plaintiff wholly lost the opportunity to sell his said bank stock, and has been unable at any time since to sell the same and said bank stock is still held by plaintiff and is without value, and by reason of such failure plaintiff has sustained damages in the sum of \$4500.00.

XIII

WHEREFORE, plaintiff prays judgment against said defendant for the sum of Forty-five Hundred

Dollars, with interest thereon from December 1, 1917, at seven per cent per anum, until judgment, and for interest on said judgment, and for his costs and disbursements incurred herein.

RICHARD H. JOHNSON,
Attorney for Plaintiff.
Residence: Boise, Idaho.

(Duly verified.)

Endorsed: Filed June 13, 1919.

Stephen Utter, Clerk.

By Thos. E. Powell, Deputy.

(Title of Court and Cause.)

ANSWER

COMES NOW the above named defendant, and answering the complaint of plaintiff on file herein, admits, denies and alleges as follows:

FIRST FOR A FIRST DEFENSE

I

Admits that this defendant is and at the times mentioned in the complaint was a corporation, duly organized under and by virtue of the laws of the State of New York, and is now and was at all such times engaged in the business of transmitting messages by telegraph for hire, owned and operated wire connections between the cities of Boise, Idaho, and Oakland, California, and was at all times mentioned in the complaint and is now engaged in transmitting telegraphic messages for hire between said cities; but denies that this defendant is now or at any of the times mentioned in the complaint was a common carrier of such messages.

II

As to the allegations of Paragraph II of the complaint, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial on that ground denies that on the 30th day of November, 1917, or for some time prior thereto, or ever since said date or at any time or at all, plaintiff was or is the owner of fifty or any shares of the capital stock of the Idaho National Bank, a corporation organized under the National Banking Laws of the United States, with its principal place of business at Boise, Idaho, which said shares, or any shares, of stock were of the par value of \$100.00 per share, or any other sum.

III

As to the allegations of Paragraph III of the complaint, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial on that ground denies that during the latter part of October, 1917, or at any time or at all, plaintiff while at Boise, Idaho, or at any other place, received information that one David Miller might desire at some future time, or at any time, to purchase as much or any of the outstanding stock in said Idaho National Bank as he could obtain for the purpose of effecting a consolidation of said Bank with the Pacific National Bank of Boise, Idaho, or for any purpose, or that the plaintiff desired to sell his said fifty or any shares of stock or was then or at any other time about to leave Boise for his home in Oakland, California, or any other place, or that prior to

plaintiff's departure for California or any other place, or early in the month of November, 1917, or at any time or at all plaintiff had an oral understanding, or any understanding, with one T. J. Jones, who resides at Boise, Idaho, or who was also an owner of stock in said Idaho National Bank, or who also desired to sell his stock, which understanding was that plaintiff and said Jones should endeavor to sell their stock jointly, or that such understanding was that said Jones should notify plaintiff at his home in Oakland, California, or any other place, whenever said Miller was ready to purchase their said stock, or any stock.

IV

As to the allegations of Paragraph IV, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial upon that ground denies that a short time thereafter or early in the month of November, 1917, or at any time or at all, plaintiff went from Boise to his home at 5767 Shafter Avenue, Oakland, California, or any other place, or that he remained there from early in November, 1917, or any other time, or until his return to Boise about the middle of February, 1918, or at any other time.

V

Admits that on or about the 30th day of November, 1917, said T. J. Jones presented to the defendant at its office in Boise, Idaho, a certain message which was typewritten upon one of the defendant's telegraph blanks supplied by defendant for that purpose,

which message was in words and figures as set forth in Paragraph V of said complaint; and defendant alleges that a true and correct copy of said message, together with the provisions and statements on the telegraph blank upon which it was written, is attached to this answer, marked Exhibit "A", and hereby referred to and made a part of this answer for the purpose of setting forth more fully the said message and the terms and conditions under which it was delivered to defendant and received by it. Admits that defendant received and accepted said message, but denies that defendant became thereby or otherwise obligated to forward the same by telegraph to plaintiff in Oakland, California, or elsewhere, except in accordance with the terms, conditions, rules and regulations printed upon said telegraph blank, as more fully shown by said Exhibit "A" hereto attached, and in this answer hereinafter alleged. Admits that said T. J. Jones paid to the defendant the regular toll or charge for transmitting said message, amounting to sixty-five cents (65c).

VI

Denies that on account of the gross negligence, or any negligence, of the defendant said message was never transmitted by defendant to plaintiff, or was consequently or otherwise never received by plaintiff.

VII

Denies that said T. J. Jones by reason of his not receiving a reply from plaintiff to said message, or for any reason, made several or any inquiries of defendant at its office in Boise, Idaho, or elsewhere,

between said 30th day of November and the 4th day of December, 1917, or at any time or at all, as to whether said message had been sent to plaintiff or in regard to said message in any way or at all, and denies that said T. J. Jones was informed by defendant that said message or any message had been sent by defendant to plaintiff or had been delivered to plaintiff on December 1st, 1917, or at any time or at all.

VIII

As to the allegations of Paragraph VIII of the complaint, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial upon that ground denies that said T. J. Jones relied upon or believed said or any statements of defendant that it had sent said or any message or delivered it to plaintiff on December 1st, 1917, or that said Jones concluded that plaintiff was on his way to Boise; denies that defendant ever made any statements that it had sent or delivered said message, as aforesaid, or otherwise. Denies that said David Miller then had the or any money with him at Boise, Idaho, for the purchase of said Bank stock, or any bank stock or other stock, of plaintiff or said T. J. Jones, or that on or about the 4th day of December, 1917, or at any time or at all said T. J. Jones sold his said bank stock, or any bank stock, to said David Miller for the sum of \$90.00 per share, or for any sum, or that said David Miller was then ready or willing to buy plaintiff's fifty shares of said stock or any number of shares, or to

pay therefore the sum of \$4,500.00, or any other sum, or that plaintiff was ready or willing to sell the same for that amount or any amount, or that except for the gross or any negligence of defendant in failing to transmit said message, or any message, to plaintiff the plaintiff would have then sold his said or any fifty shares of stock to said David Miller or would have received therefor the sum of \$4,500.00, or any other sum.

IX

As to the allegation that plaintiff was not informed that said message had been delivered to defendant to be sent to him until his return to Boise, Idaho, from Oakland, California, or elsewhere, about the middle of February, 1918, or at any other time, this defendant has no knowledge, information, or belief sufficient to enable it to answer, and basing its denial upon that ground denies such allegation and each and every part thereof. Admits that about the middle of February, 1918, plaintiff, accompanied by said T. J. Jones, called at the defendant's office in Boise, Idaho, and was informed that said message had never been sent to plaintiff, but denies that the original message which was delivered by said T. J. Jones to defendant on November 30, 1917, or at any other time, was then delivered by defendant to plaintiff, or that plaintiff and said Jones, or plaintiff or said Jones, called at defendant's office immediately upon plaintiff's learning that said telegram had been delivered to defendant to be sent to him.

X

Admits that on or about the 15th day of February, 1918, said T. J. Jones received from defendant that certain letter in words and figures as set out in Paragraph X of the complaint herein, and that said letter contained a check for said 65c tolls paid by said T. J. Jones for transmitting said message, and that said check was not accepted by said Jones or by plaintiff, but was returned by them to defendant.

XI

As to the allegations of Paragraph XI, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial upon that ground defendant denies that ever since the time plaintiff first learned that said message had been delivered to defendant to be sent to him, to-wit: about the middle of February, 1918, or at any time or at all, plaintiff's said or any bank stock has had no market value whatever, for the reason that said Idaho National Bank went into liquidation and is no longer operating as a bank, and its assets are being applied to the payment of its outstanding debts, or for any other reason or at all, or that the assets, or any assets, of said bank will not be greater in value than the said or any indebtedness, or that nothing will be available for the stockholders of said bank when such liquidation is closed, or at any time or at all.

XII

Denies that by reason of the failure of defendant

to transmit said or any message to him, plaintiff wholly or otherwise lost the opportunity to sell his said or any bank stock, or has been unable at any time since to sell the same, or that said Bank stock is still held by plaintiff or is without value, or that by reason of such failure plaintiff has sustained damages in the sum of \$4,500.00, or any other sum.

SECOND FOR A SECOND SEPARATE AND FURTHER DEFENSE

I

That defendant is now and at all the times mentioned in the complaint herein was a corporation duly organized under and by virtue of the laws of the State of New York, and is now and at all times herein mentioned was engaged in the business of transmitting telegraph messages for hire between the cities of Boise, Idaho, and Oakland, California, and elsewhere in interstate commerce, and that the message alleged to have been delivered by said T. J. Jones to defendant was an interstate message to be sent from a point in the State of Idaho to a point in the State of California, and was as such interstate commerce, and that said message was delivered to and accepted by the defendant subject to the terms of a certain contract in writing, a copy of which is attached to this answer, marked Exhibit "A", made a part hereof and hereby referred to for a more full and complete statement of the terms of said contract.

II

That as more fully appears from said Exhibit "A", attached hereto, it was a term and condition of the said contract subject to which, and subject to which only, such message was accepted by the defendant, that the defendant should not be liable for damages or statutory penalties in any case where the claim therefor was not presented in writing within sixty days after the telegram was filed with the Company for transmission, and that no claim in writing was presented to defendant within sixty days after the telegram was filed with defendant for transmission, or at any time or at all, except on or about the 18th day of June, 1918, when plaintiff addressed a letter to defendant's manager at Boise, Idaho, demanding payment of the sum of \$4,500.00, with interest from and after the 9th day of December, 1917.

III

That by the Act of Congress approved June 18, 1910 (36 Stat. L. 539) the Congress of the United States entered and assumed charge of regulating the field of interstate communication by telegraph, and thereby removed and exempted such interstate communication by telegraph from the field of State regulation or interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce, and in particular conferred on the Interstate Commerce Commission power to approve,

alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains.

IV

That the said Interstate Commerce Commission, prior to the filing of the message sued on and prior to the commencement of this action, had full knowledge of the rates, charges and classifications established by the defendant as above described, and, with such knowledge, acquiesced in and approved the same, and did not at any time alter or seek to alter such rates, charges, classifications or regulations, and thereby recognized the right of the defendant to charge a higher rate for a greater liability and a lower rate for a less liability, as above described.

V

That the said stipulation in the contract subject to which said message was accepted, to the effect that claim in writing for any damages should be made within sixty days after the message was filed for transmission, was reasonable and valid and binding upon the plaintiff herein, and free from any regulation or control on the part of the State of Idaho.

THIRD FOR A THIRD SEPARATE AND FURTHER DEFENSE

I

That defendant is now and at all the times mentioned in the complaint herein was a corporation duly organized under and by virtue of the laws of the State of New York, and is now and at all times

herein mentioned was engaged in the business of transmitting telegraph messages for hire between the cities of Boise, Idaho, and Oakland, California, and elsewhere in interstate commerce.

II

That the message referred to in the complaint was delivered to and accepted by the defendant subject to the terms of a certain contract in writing, a copy of which is hereto annexed, marked Exhibit "A", hereby referred to, and made a part of this answer.

III

That as more fully appears from Exhibit "A", hereto annexed, it was a term and condition of the said contract, subject to which, and subject to which only, such message was accepted by the defendant, that the defendant should not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated message beyond the amount received for sending the same; and that the said message was an unrepeated message and defendant was not directed or requested to repeat the same and all that the defendant received in exchange for its obligation in respect to said message was the sum of 65c, which was defendant's ordinary and reasonable charge for the transmission of such a message, without repetition, from the point of origin to the point of destination named therein, including its delivery at destination.

IV

That such message was an interstate message, to

be sent from a point in the state of Idaho to a point in the State of California, and was, as such, interstate commerce.

V

That by the defendant's established rules, regulations and tariffs, as the same were in effect prior to June 18, 1910, and are still maintained and established, messages are classified, among other classifications, into "repeated" and "unrepeated"; a repeated message, as the name implies, being a message which the defendant agrees that the office of destination shall transmit back, after receiving it, to the point of origin, in order to avoid mistakes, etc.; that in the case of unrepeated messages defendant assumes no liability (except for gross negligence) beyond the amount received for sending the same, while in the case of repeated messages defendant does not undertake to limit its liability to the amount received for sending them, but assumes, on the contrary, liability for not to exceed fifty times the amount received for sending the message (except in so far as such liability may be further limited by other provisions of the contract); and that for the additional work of repeating a message and the additional risk of liability assumed in the case of a repeated message, the defendant, at all the times mentioned, made and still makes an additional charge equal to one-half of the unrepeated message rate.

VI

That by the Act of Congress approved June 18,

1910, (36 Stat. L. 539) the Congress of the United States entered and assumed charge of regulating the field of interstate communication by telegraph, and thereby removed and exempted such interstate communication by telegraph from the field of State regulation or interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce, and in particular conferred on the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains.

VII

That the said Interstate Commerce Commission, prior to the filing of the message sued on and prior to the commencement of this action, had full knowledge of the rates, charges and classifications established by the defendant as above described, and, with such knowledge, acquiesced in and approved the same, and did not at any time alter or seek to alter such rates, charges, classifications or regulations, and thereby recognized the right of the defendant to charge a higher rate for a greater liability and a lower rate for a less liability, as above described.

By reason of which, and of all the premises, the defendant says that the stipulation in the contract, subject to which this message, if any, was accepted,

to the effect that the defendant's liability should not, in any event, exceed the sum of sixty-five cents, was reasonable and valid and binding on the plaintiff herein, and free from any regulation or control on the part of the State of Idaho or any other State, so that the defendant ought not to be liable, in any event, in this action beyond the sum of sixty-five cents, with interest from the first day of December, 1917.

FOURTH FOR A FOURTH SEPARATE AND FURTHER DEFENSE

I

Defendant repeats all the allegations of the third separate and further defense herein.

II

Alleges that as more fully appears by Exhibit 'A', hereto, annexed, it was a term and condition of the said contract, subject to which, and subject to which only, the said message was accepted by the defendant, that the defendant should not be liable for mistakes or delays in the transmission or delivery or for non-delivery of a message, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount the said message was valued by the sender thereof.

III

That such message was an interstate message, to be sent from a point in the State of Idaho to a point in the State of California, and was, as such, interstate commerce.

IV

That by the defendant's established rules, regulations and tariffs, as the same were in effect prior to June 18, 1910, and are still maintained and established, messages are classified, among other classifications, into messages valued by the senders thereof at fifty dollars, and messages valued by the senders thereof at some specified sum in excess of fifty dollars; that all defendant's ordinary rates and tariffs for the transmission and delivery of messages are based on the assumption that the message is valued at fifty dollars or less, and that in the case of a message valued at a specified sum in excess of fifty dollars, it was at all the times mentioned and still is the rule, regulation, tariff and practice of the defendant to charge and collect an additional sum to cover the increased risk of liability, which additional sum is based on the valuation and is equal to one-tenth of one per cent thereof.

V

That by the Act of Congress, approved June 18, 1910, (36 Stat. L. 539), the Congress of the United States entered and assumed charge of regulating the field of interstate communication by telegraph, and thereby removed and exempted such interstate communication by telegraph from the field of State regulation or interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such

interstate commerce, and in particular conferred on the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains.

VI

That the said Interstate Commerce Commission, prior to the commencement of this action, had full knowledge of the rates, charges and classifications established by the defendant as above described, and, with such knowledge, acquiesced in and approved the same, and did not, at any time, alter or seek to alter such rates, charges, classifications or regulations, and thereby recognized the right of the defendant to charge a higher rate for a greater liability and a lower rate for a less liability, as above described.

By reason of which and of all the premises defendant says that it ought not to be liable to the plaintiff in this action in any event beyond the sum of fifty dollars, with interest from the 1st day of December, 1917.

WHEREFORE, having fully answered the complaint of plaintiff herein, defendant prays that plaintiff take nothing by his said action, that defendant be dismissed hence without day, and that defendant have judgment for its costs and disbursements in this action, most unjustly expended.

RICHARDS & HAGA,

Attorneys for Defendant.

Residence: Boise, Idaho.

(Duly verified.)

EXHIBIT A

WESTERN UNION

Class of Service		Form 1206
Desired	Western Union	Receiver's No.
Fast Day Message	TELEGRAM	M. B. 60
Day Letter		Check
Night Message		49 pdnl.
Night Letter	X	Time Filed

Patrons should mark an "X" opposite the class of service desired; OTHERWISE THE TELEGRAM WILL BE TRANSMITTED AS A FAST DAY MESSAGE.

NEWCOMB CARLTON, President.

GEORGE W. E. ATKINS, First Vice-President.

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to.

Boise, Idaho, November 30, 1917.

J. A. CZIZEK,

5767 Shafter Avenue

Oakland, Calif.

Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow Will you take ninety dollars per share for yours I am inclined to accept offer for mine Answer.

T. J. JONES.

(454 Yates B)

(.65c) (408-W)

All telegrams taken by this company are subject to the following terms:

To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:

1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED telegram, beyond fifty times the sum received for sending the same, *unless specially valued*; nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams.*

2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

3. The Company is hereby made the agent of the sender, without liability, to forward this telegram over the lines of any other Company when necessary to reach its destination.

4. Telegrams will be delivered free within one-half mile of the Company's office in towns of 5,000 population or less, and within one mile of such office in other cities or towns. Beyond these limits the Company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reasonable price.

5. No responsibility attaches to this Company concerning telegrams until the same are accepted at one of its transmitting offices; and if a telegram is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission.

7. *Special terms governing the transmission of messages under the classes of messages enumerated below shall apply to messages in each of such respective classes in addition to all the foregoing terms.*

8. *No employee of the Company is authorized to vary the foregoing.*

THE WESTERN UNION TELEGRAPH COMPANY, Incorporated.

NEWCOMB CARLTON, *President.*

CLASSES OF SERVICE

FAST DAY MESSAGES

A full-rate expedited service.

NIGHT MESSAGES

Accepted up to 2:00 A. M. at reduced rates to be sent during the night and delivered not earlier than the morning of the ensuing business day.

DAY LETTERS

A deferred day service at rates lower than the standard day message rates as follows: One and one-half times the standard Night Letter rate for the transmission of 50 words or less and one-fifth of the initial rate for each additional 10 words or less.

SPECIAL TERMS APPLYING TO DAY LETTERS:

In further consideration of the reduced rate for this special "Day Letter" service, the following special terms in addition to those numerated above are hereby agreed to:

A. Day Letters may be forwarded by the Telegraph Company as a deferred service and the transmission and delivery of such Day Letters is, in all respects, subordinate to the priority of transmission and delivery of regular telegrams.

B. Day Letters shall be written in plain English. Code language is not permissible.

C. This Day Letter may be delivered by the Telegraph Company by telephoning the same to the

addressee, and such delivery shall be a complete discharge of the obligation of the Telegraph Company to deliver.

D. This Day Letter is received subject to the express understanding and agreement that the Company does not undertake that a Day Letter shall be delivered on the day of its date absolutely and at all events; but that the Company's obligation in this respect is subject to the condition that there shall remain sufficient time for the transmission and delivery of such Day Letter on the day of its date during regular office hours, subject to the priority of the transmission of regular telegrams under the conditions named above.

No employee of the Company is authorized to vary the foregoing.

NIGHT LETTERS

Accepted up to 2:00 A. M. for delivery on the morning of the ensuing business day, at rates still lower than standard night message rates, as follows: The standard day rate for 10 words shall be charged for the transmission of 50 words or less, and one-fifth of such standard day rate for 10 words shall be charged for each additional 10 words or less.

SPECIAL TERMS APPLYING TO NIGHT LETTERS:

In further consideration of the reduced rate for this special "Night Letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

A. Night Letters may at the option of the Telegraph Company be mailed at destination to the ad-

dressees, and the Company shall be deemed to have discharged its obligation in such cases with respect to delivery by mailing such Night Letters at destination, postage prepaid.

B. Night Letters shall be written in plain English. Code language is not permissible.

No employee of the Company is authorized to vary the foregoing.

Endorsed: Filed December 22, 1919.

W. D. McReynolds, Clerk.

(Title of Court and Cause)

DECISION

April 28, 1920

Richard H. Johnson, Attorney for Plaintiff.

Richards & Haga, Attorneys for Defendant.

DIETRICH, *District Judge*:

This suit is brought to recover damages for failure of the defendant to send the following telegram:

“November 30, 1917.

“J. A. Czizek,

“5767 Shafter Avenue,

“Oakland, Calif.

“Miller advises Idaho National sold to Pacific Offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow Will you take ninety dollars per share for yours I am inclined to accept offer for mine. Answer.

“T. J. JONES.”

It is admitted, or the evidence conclusively shows, that the message, written upon a regular blank form, was filed for transmission in the defendant's office at Boise, Idaho, on November 30th, 1917, the charges being prepaid upon the basis of the established tariffs for ordinary messages; that it was never delivered to the plaintiff and indeed was not transmitted at all; that on February 14th, 1918, for the first time, the plaintiff learned that the message had been filed, and the sender that it had not been delivered; and upon that date together they made inquiry at the defendant's Boise office, whereupon, after investigation, the manager of the office addressed a letter to the sender, dated February 14th, acknowledging the failure to transmit and tendering a return of the charges paid; that there was no written or formal demand for damages by plaintiff until June 18th, 1918, at which time he presented a claim in writing for \$4,500.00, on the theory that the fifty shares of bank stock owned by him were, and ever since the middle of February, 1918, had been, worth that sum, whereas if the telegram had been promptly delivered he could and would have sold the same for \$90.00 per share. In response to this demand promise was made to investigate, but without waiving the defense that the claim was barred by reason of the plaintiff's failure to make demand within the period specified on the telegraph blank.

While the point is controverted, I think it also clear that in filing the message the sender was acting

for the plaintiff and as his agent. Fairly construed, the complaint so implies, and in his letter or demand of June 18th the plaintiff uses this language: "It (the message) was sent to me by my associate and agent, Mr. T. J. Jones, of Boise, Idaho." This view, it may be added, is also corroborated by other circumstances shown in evidence.

I further find that Miller desired and was able to buy the stock at \$90.00 per share, and that the telegram is to be construed as advising plaintiff of an offer of \$90.00, and, had it been delivered, such is the meaning it would have conveyed to him. Besides the contention that no damage can be recovered because at most the message advised the plaintiff only of an offer to buy and there is no way of knowing whether he would or would not have accepted, defendant relies upon three defenses predicated upon the printed conditions endorsed upon the blank form upon which the message was written. This endorsement is as follows:

"To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:

"1. The Company shall not be liable for mis-

takes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED telegram, beyond fifty times the sum received for sending the same, *unless specially valued*; nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams.*

“2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid, based on such value equal to one-tenth of one per cent. thereof.

* * * * *

“6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission.”

The message being interstate in its character is subject to Federal law, and these clauses are to be

considered in the light of the Interstate Commerce Act, especially as amended by the Act of June 18th, 1910, 36 Stat. 539. *Postal Telegraph Co. vs. Warren-Goodwin L. Co.*, (U. S. Supreme Court decision, December 8, 1919). *Western Union Tel. Co. vs. Boegli* (U. S. Supreme Court decision, January 12, 1920). Certain general principles involved are thought to be illuminated by the following cases: *B. & M. R. R. Co. vs. Hooker*, 233 U. S. 97. *Erie R. R. Co. vs. Stone*, 244 U. S. 332. *Georgia F. & A. R. Co. vs. Blish. M. Co.*, 241 U. S. 190. *St. Louis I. M. & S. Co. vs. Starbird*, 243 U. S. 592. *Southern Pac. R. R. Co. vs. Stewart*, 248 U. S. 446. *Gardner vs. Western Union Tel. Co.*, 231 Fed. 405. *Western Union Tel. Co. vs. Lange*, 248 Fed. 656. *Gooch vs. Oregon Short Line R. R. Co.* (C. C. A., 9th Cir., Decision filed April 5, 1920.)

It should be added that the form of the telegraph blank here involved, with the indorsement thereon, had been regularly filed with the Interstate Commerce Commission and had been published as required by law.

Under the cases cited, it is thought to be clear that stipulations requiring claims for damages to be presented in writing within a specified period are valid and binding when reasonable in their terms and not prohibited by statute or opposed to considerations of public policy. As applied to the facts of this case, the requirement that demand in writing must be presented within sixty days from the filing of the message, if construed literally, would have

to be held unreasonable, for the parties concerned were wholly ignorant of defendant's failure to send or deliver the message until after the expiration of that time. But I am inclined to think that the proper view to take of the provision is that the period of limitation did not begin to run until the plaintiff learned of the default and that he had sixty days thereafter in which to present his claim. I do not find that the precise point has been passed upon, but such seems to be the view implied in *Telegraphic Co. vs. Nichols*, 159 Fed. 643, and *Telegraph Co. vs. Lee*, 192 S. W. 70.

Admittedly the plaintiff had full knowledge on February 14th, but did not make demand until June 18th, a period of a little more than four months. If I have properly interpreted the stipulation, it necessarily follows that the claim is barred.

Were the question one of first impression, I would have difficulty in declining the view that the "repeated telegram" clause is applicable and binding. In terms it covers non-delivery as well as errors in transmission and delays, and, under the evidence, it appears that "repeated" messages are so handled that failure to transmit is less likely to occur than in a case of ordinary messages. But in the *Lange* case (248 Fed. 656), involving facts somewhat different, it is true, the Circuit Court of Appeals for this circuit reached a contrary conclusion, which is deemed to be controlling.

The validity and applicability of the "specially valued" clause are challenged upon two grounds:

It is first urged that the charges for telegrams of that class are unreasonable and prohibitive. But such objection is not thought to be available to the plaintiff in an action of this character. *Erie R. R. Co. vs. Stone*, 244 U. S. 332. The other contention is that the default under consideration constitutes "gross negligence" and that it was incompetent for defendant to stipulate against responsibility therefor. "Gross negligence" is a phrase of vague and flexible import, and, as often used, its meaning is obscure. There is no evidence that the defendant willfully or fraudulently withheld the message from its wires. The failure was doubtless due to a want of care on the part of an office employe, but I do not think it could be held that with the exercise of ordinary care such a default would be impossible. There is nothing unusual on the face of the message—nothing to impress those into whose hands it may have come that it was of special importance; and no suggestion to that effect was made when it was filed. The very purpose of "repeated" or "specially valued" messages, it is to be assumed, is to put employes on their guard and to protect the Company against a default of this character as well as against errors in transmission, and delays. The statute expressly recognizes such classifications, and if the tariff is too high, the remedy, as already indicated, is with the Interstate Commerce Commission. The plaintiff is bound by the conditions he accepted, and he cannot now escape the obligations thereof by claiming that the charges for sending a "valued"

telegram would have been excessive.

As already stated, the other defense is that the evidence is insufficient to support a finding that plaintiff suffered any damages as a result of his failure to receive the telegram. It involves the question whether he would or would not have embraced the opportunity of which the telegram was intended to advise him, and, if so, whether he could and would have delivered the stock, which was then held in a San Francisco bank, as collateral, while Miller was willing and able to keep his offer good. The inherent difficulty, held to be insuperable in many of the cases, is the impossibility of determining what, in the exercise of his independent judgment, a man would have decided to do in a given contingency which never happened. Would the plaintiff have accepted the offer? Jones, the sender of the message, did, after some consideration of the conditions as he knew them, decide to accept a similar offer for his stock. However, it will be noted that he made no recommendation to the plaintiff, and in the telegram avoided the expression of any very positive opinion as to what was best to do. He said only: "I am inclined to accept for mine." We have no way of knowing whether the plaintiff, who was necessarily ignorant of the precise situation, would have sought to negotiate for a higher price and thus lost the opportunity. Manifestly, to take advantage of the offer it was necessary to act promptly, for there was a crisis in the affairs of the bank and apparently in Miller's financial ability, and counsel for the de-

fendant argue with much plausibility that even had the telegram been sent and delivered plaintiff would not have been able to get the stock to Boise within the required time. Applying the principle recognized in many, and, so far as I am advised, most, of the decided cases, I feel impelled to sustain the defense. *Western Union Tel. Co. vs. Hall*, 124 U. S. 444. *Richmond H. Mills vs. Western Union Tel. Co.*, 123 Ga. 216, 51 S. E. 290. *Bennett vs. Western Union Tel. Co.*, 129 Ia. 607, 106 N. W. 13. *Smith vs. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126. *Western Union Tel. Co. vs. Odams Mach. Co.*, 92 Miss. 849, 47 So. 412. *Cherokee T. Ex. Co. vs. Western Union Tel. Co.*, 143 N. C. 376, 55 S. E. 777. *Harmon vs. Western Union Tel. Co.*, 65 S. C. 490, 43 S. E. 959. *Beatty L. Co. vs. Western Union Tel. Co.*, 52 W. Va. 410, 44 S. E. 309. *Fisher vs. Western Union Tel. Co.*, 119 Wis. 146, 96 N. W. 545. *Western Union Tel. Co. vs. Watson*, 94 Ga. 202, 21 S. E. 457. *Bass vs. Postal Tel. Cab. Co.*, 127 Ga. 423, 53 S. E. 465. *Wilson vs. Western Union Tel. Co.*, 124 Ga. 131, 52 S. E. 153. *Western Union Tel. Co. vs. Webb*, 48 So. 408. *Western Union Tel. Co. vs. Ferguson*, 54 L. R. A. 846. *Hall vs. Western Union Tel. Co.*, 27 L. R. A. (N. S.) 639.

Endorsed: Filed April 29, 1920.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

JUDGMENT

This cause having come on to be heard on the 28th day of February, 1920, before the Court with-

out the intervention of a jury (the parties through their attorneys of record having before the commencement of the trial filed with the Clerk a stipulation in writing waiving a jury), Richard H. Johnson, Esq., appearing for plaintiff and Messrs. Richards & Haga appearing for defendant, and the Court having heard the evidence, oral and documentary, introduced by the respective parties, and being fully advised in the premises, finds, concludes and decides in favor of the defendant.

Wherefore, upon motion of Messrs. Richards & Haga, attorneys for defendant, it is hereby considered, ordered and adjudged that the said plaintiff take nothing by his complaint herein, and that defendant have judgment for its costs expended in this action, taxed at \$42.45.

Done in open Court this 8th day of May, 1920.

(Signed) FRANK S. DIETRICH,
District Judge.

Endorsed: Filed May 11, 1920.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

NOTICE OF ENTRY OF JUDGMENT

*To J. A. Czizek, the above named plaintiff, and to
Richard H. Johnson, Esq., attorney of record:*

YOU, AND EACH OF YOU, ARE HEREBY NOTIFIED, That a written decision and judgment in the above entitled cause was made and entered in the above entitled Court on the 8th day of May, 1920.

A copy of such judgment is hereby served upon you.

RICHARDS & HAGA,
Attorneys for Defendant.

Endorsed: Filed May 11, 1920.

W. D. McReynolds, Clerk.

Service of the above Notice is hereby acknowledged this 8th day of May, 1920.

RICHARD H. JOHNSON,
Attorney for Plaintiff.

(Title of Court and Cause.)

BILL OF EXCEPTIONS

This was an action at law originally commenced in the District Court of Ada County, State of Idaho, to recover \$4500 damages for failure to transmit a telegraphic message. The complaint was filed June 13th, 1919, and on July 2nd, 1919, the defendant filed its petition for removal to the above entitled Court and at the same time filed a bond on removal in due form together with a demurrer to the complaint. The petition for removal, regular in form, was based on the ground that the plaintiff, at the time of the commencement of the action, was a citizen and resident of the State of Idaho, and that the defendant corporation was a citizen and resident of the State of New York, and that the amount involved exceeded the jurisdictional amount of \$3000 exclusive of interest and costs. The record was thereafter removed to this Court by the clerk, and the plaintiff duly filed a motion to remand the case to the State Court and

supported the same by affidavits. The following are copies of the motion to remand together with the affidavits filed in support thereof:

(Title of Court and Cause.)

MOTION TO REMAND

Comes now the plaintiff, J. A. Czizek, by his attorney Richard H. Johnson, and appearing specially for the purpose of this motion only, saving and reserving any and all objections to the insufficiency of the petition for removal herein and expressly denying that this Court has jurisdiction of this action or of the plaintiff herein, respectfully moves the Court to remand said action to the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, from whence it was removed, for the reason that at the time of the commencement of said action and ever since said time, the plaintiff was and is a resident and citizen of the State of California, and the defendant at the time of the commencement of said action was and ever since has been a corporation organized under and by virtue of the laws of the State of New York, and a resident and citizen of the State of New York.

This motion is made upon the records and files herein and upon the affidavit of plaintiff heretofore filed herein and upon the affidavits of F. E. Parfitt, John F. Koelsch, Frank Struckman, Ed Roden and William Patterson, which are filed herewith.

Dated September 12, 1919.

(Signed) RICHARD H. JOHNSON,
Attorney for Plaintiff, appearing specially for the purposes of this motion only.

State of Idaho,
County of Ada,—ss.

J. A. Czizek, being first duly sworn upon his oath, deposes and says: that he is the plaintiff in the above entitled action and has read the foregoing motion and knows the contents thereof, and that the facts therein stated are true.

(Signed)

J. A. CZIZEK.

Subscribed and sworn to before me this 9th day of August, 1919.

(Signed)

RICHARD H. JOHNSON,

Notary Public.

(Notarial Seal)

Residence: Boise, Idaho.

(Title of Court and Cause.)

AFFIDAVITS

State of Idaho,
County of Ada,—ss.

J. A. Czizek, being first duly sworn deposes and says: That he is the plaintiff in the above entitled action, and has read the petition of the above named defendant filed herein for the removal of said action into the District Court of the United States for the Southern Division of the District of Idaho.

That at the time of the commencement of this action and for a long time prior thereto, and ever since said action was commenced, affiant was not and is not now, a citizen or resident of the State of Idaho, but at the time said suit was begun, and for some time prior thereto and ever since, affiant was and is now a citizen and resident of the State of California,

and during such times had and still has his home and residence in the City of Oakland, in said State of California and during all of such times and at the time said suit was begun and ever since, affiant has resided and still resides, with his family consisting of his wife and son in his home in said City of Oakland and his visits to the State of Idaho during such time were and are only temporary and for the purpose of looking after his business interests in said State of Idaho.

And further affiant saith not.

(Signed)

J. A. CZIZEK.

Subscribed and sworn to before me this 2nd day of July, 1919.

(Seal)

C. S. RATHBUN,

Notary Public.

Residence: Boise, Idaho.

(Title of Court and Cause.)

AFFIDAVIT

State of California,
County of San Mateo,—ss.

F. E. Parfitt, being first duly sworn deposes and says: I am a citizen of the United States, over the age of 21 years and am well acquainted with Jay A. Czizek, the above named plaintiff. I first became acquainted with the said Jay A. Czizek in the summer of 1915, at which time I was the Manager of the College Avenue Branch of the Security Bank of Oakland, California. Mr. Czizek purchased a home in Oakland in July, 1915, and thereupon moved there

with his family consisting of his wife and son and mother-in-law, where they have since resided.

I have often visited Mr. Czizek's home in Oakland and saw Mr. Czizek on many occasions. He has often expressed to me voluntarily, both prior and since June 13, 1919, that his home and residence was in Oakland, California. He has also often expressed to me that he was trying to dispose of his many holdings in other states and concentrate them in the State of California.

(Signed)

F. E. PARFITT.

Subscribed and sworn to before me this 18th day of August, 1919.

(Notarial Seal)

P. E. LAMB,

Notary Public in and for County of San Mateo, State of California.

(Title of Court and Cause.)

AFFIDAVIT

J. F. Koelch, being first duly sworn deposes and says: that he is a citizen of the United States, over the age of twenty-one years, and resides in Boise, Idaho. That he is engaged in the business of auditor and accountant. That he has been acquainted with the plaintiff for more than ten years last past, and for some time past has been in the employ of said plaintiff in keeping his books in connection with plaintiff's business interests in Idaho, and was employed for this purpose by plaintiff, by reason of the fact of plaintiff's frequent and long-continued absence from the State of Idaho, at his home in California and other places.

That on account of affiant's business relations with plaintiff and from voluntary statements made to affiant by plaintiff, prior to June, 1919, affiant knows of his own knowledge that on June 13, 1919, and for some time prior thereto, plaintiff was a citizen and resident of the State of California, and that his home was at that time and still is in the city of Oakland in said State, where he purchased a home and where he has resided with his family for some time prior and ever since the month of June, 1919.

(Signed)

J. F. KOELSCH.

Subscribed and sworn to before me this 11th day of September, 1919.

(Signed)

RICHARD H. JOHNSON,

(Notarial Seal)

Notary Public.

Residence: Boise, Idaho.

(Title of Court and Cause.)

AFFIDAVIT

Frank Struckman, being first duly sworn, upon his oath deposes and says: that he is a citizen of the United States, over the age of twenty-one years and resides at Warren in said County of Idaho, where he is engaged in business. That he has known plaintiff for many years and that he has on several occasions prior to the month of June, 1919, heard Mr. Czizek say he would never reside in Idaho again and that he had and owned his home in California and would educate his son there who is now and has been attending the schools of California for many years.

(Signed)

FRANK STRUCKMAN.

Subscribed and sworn to before me this 8th day of September, 1919.

(Notarial Seal)

WALTER MARTIN,

Notary Public.

Warren, Idaho.

(Title of Court and Cause.)

AFFIDAVIT

State of Idaho,

County of Idaho,—ss.

Ed. Roden, being first duly sworn upon his oath deposes and says: that he is a citizen of the United States, over the age of twenty-one years and resides at Warren in said County of Idaho, where he is engaged as a Hotel Proprietor.

That he has been acquainted with the plaintiff, Jay A. Czizek for many years. That prior to the general state and county election held in November, 1918, the said Jay A. Czizek had been a member of the County Central Committee of the Democratic party for said Idaho County. That after said election said Jay A. Czizek refused to serve any longer as such County Committeeman and stated that his reasons for such refusal were that he was no longer a legal resident of the State of Idaho, and that his home and legal residence were in the State of California.

That affiant has heard the said Jay A. Czizek on several occasions prior and subsequent to June 13, 1919, say that his home and residence were in the State of California, and that the health of his wife

had improved so greatly after they went to California that he had decided to make his permanent home there.

(Signed)

ED. RODEN.

Subscribed and sworn to before me this 1st day of September, 1919.

(Signed)

WALTER MARTIN,

(Notarial Seal)

Notary Public.

Residing at Warren, Idaho.

(Title of Court and Cause.)

AFFIDAVIT

State of Idaho,

County of Idaho,—ss.

William Patterson being duly sworn, upon his oath deposes and says: that he is a citizen of the United States, over the age of twenty-one years and resides at Warren in said County of Idaho, where he is engaged in merchandising. That he has been acquainted with plaintiff, J. A. Czizek for many years and that frequently he has heard plaintiff say, prior to the month of June, 1919, that he was disposing of his real estate and everything other than his mining property, in the State and would concentrate whatever investments made in and around his home in California.

(Signed)

WILLIAM PATTERSON.

Subscribed and sworn to before me this 8th day of September, 1919.

(Notarial Seal)

WALTER MARTIN,

Notary Public.

Warren, Idaho.

Thereafter counter affidavits were filed by defendant, copies of which are as follows:

(Title of Court and Cause.)

AFFIDAVIT

State of Idaho,

County of Idaho,—ss.

Henry Telcher, being first duly sworn, deposes and says: That he is Clerk of the District Court and Ex-officio Auditor and Recorder of Idaho County, State of Idaho, and as such officer has custody and possession of the registration and voting records in said County; that it appears from said records that the above named plaintiff, J. A. Czizek, is a registered voter in Warren Precinct in said Idaho County, and that he voted at the state and national election in 1916 and the state election in 1918 in said precinct.

Further affiant saith not.

(Signed)

HENRY TELCHER.

Subscribed and sworn to before me this 25th day of September, 1919.

(Signed)

R. F. FULTON,

(Notarial Seal)

Notary Public for Idaho.

Residing at Grangeville, Idaho.

(Title of Court and Cause.)

AFFIDAVIT

United States of America,

State of Idaho,

County of Ada,—ss.

McKeen F. Morrow, being first duly sworn, upon his oath deposes and says: That he has examined

the Visitors' Register at the Idanha Hotel, where plaintiff, J. A. Czizek, usually stays when in Boise; that said J. A. Czizek registered in said Visitors' Register at said hotel from Warren, Idaho, on June 7th, 1919, on June 25th, 1919, and on July 23rd, 1919, writing the word "Warren" after his name in each case under the word "Residence".

Further affiant saith not.

(Signed) McKEEN F. MORROW.

Subscribed and sworn to before me this 9th day of October, 1919.

(Signed) ALTA F. KNAPP,
(Notarial Seal) *Notary Public for Idaho.*
Residing at Boise, Idaho.

STATE OF IDAHO

DEPARTMENT OF STATE

I, Robert O. Jones, Secretary of State of the State of Idaho, do hereby certify that the records of this office show that Jay A. Czizek of Warren, Idaho County, Idaho, was duly and regularly appointed to the office of Commissioner of Immigration, Labor and Statistics for the State of Idaho for the term of two years beginning January 25, 1915, and ending January 25, 1917.

I further hereby certify that according to the said records Mr. Czizek served his full term.

In testimony whereof, I have hereunto set my hand and affixed the Great Seal of the State. Done at Boise, the Capital of Idaho, this 9th day of October, in the year of our Lord One Thousand Nine

Hundred and Nineteen, and of the Independence of the United States of America the One Hundred and Forty-fourth.

(Signed)

ROBERT O. JONES,

(Seal)

Secretary of State.

The foregoing affidavits constitute all of the evidence before the Court used upon said motion to remand. On the 10th day of October, 1919, after argument of the motion to remand, the Court decided that plaintiff at the time the action was commenced, was a citizen and resident of Idaho, and made and entered an order denying the motion, a copy of which order is as follows:

(Title of Court and Cause.)

ORDER DENYING MOTION TO REMAND

This cause coming on regularly to be heard this 10th day of October, 1919, at 10 o'clock A. M., on plaintiff's motion to remand, and the Court having considered the records and files in this action, including the affidavits in support of such motion and the counter-affidavits filed by defendant, and the cause having been argued and submitted, and the Court being fully advised in the premises,

Now, therefore, it is hereby ORDERED, that said motion to remand be, and the same is hereby, denied and overruled.

IT IS FURTHER ORDERED That plaintiff be allowed an exception to such ruling.

After the Court announced his ruling in said motion, counsel for plaintiff asked leave to make a further showing as to the residence and citizen-

ship of plaintiff at the time the action was commenced and since that time, which, upon objections being made by counsel for defendant, was denied by the Court.

Dated this 10th day of October, 1919.

(Signed) FRANK S. DIETRICH,
District Judge.

To which order of the Court counsel for plaintiff then and there excepted, which exception was duly allowed by the Court.

Thereafter and on the 28th day of February, 1920, the said cause came on for trial before the Hon. Frank S. Dietrich, District Judge, without a jury, a stipulation waiving a jury having been signed by the attorneys for the respective parties and filed in said cause, Richard H. Johnson, Esq., appearing as counsel for plaintiff and Messrs. Richards and Haga and McKeen F. Morrow appearing as counsel for the defendant. At the request of counsel, the Court made an order that all adverse rulings of the Court should be deemed excepted to. The following constitutes all of the evidence, documentary and oral, which was introduced at the trial:

T. J. Jones, produced as witness on behalf of plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Johnson:

"I am sixty-two years of age and reside in Boise, Idaho, and am a lawyer by profession. I am acquainted with the plaintiff, J. A. Czizek, and prior to November 30th, 1917, I was acquainted with one David Miller and was also acquainted with an insti-

tution known as the Idaho National Bank. I was a stockholder in that bank prior to December 4th, 1917, and owned individually, fifteen shares of stock. The par value of that stock was \$100.00 a share. Prior to November 30th, 1917, or along during that month or in October, I had a conversation with the plaintiff, Mr. Czizek with reference to the bank stock. Mr. Czizek and I were both stockholders. I had fifteen shares and Czizek had fifty. As I was here practically all the time and Czizek was here only occasionally, it was understood and agreed that neither of us was to sell unless we both sold, and that we were to try and get par, that is, the par value of the stock. Yes, in another conversation there was something said with reference to Mr. Miller being a possible purchaser. The last talk I had with Mr. Czizek prior to the sale of the stock which I think was in November, possibly in October, Mr. Czizek said that Mr. Miller would be here and he would have plenty of money to take care of and buy all the stock that Miller might deem was necessary to get control of the Idaho National or to consolidate with the Pacific National and make one good bank out of the two. And I knew that Mr. Miller was negotiating with the Pacific National Bank and I knew from talks that I had had with Miller that he was negotiating to build up the Idaho National Bank. Mr. Miller at that time was Vice President of the Idaho National. He then owned stock at that time. He had paid me for what was known as the Fletcher stock, \$15,000 for two hundred shares. I

had a good many conversations directly with Mr. Miller with reference to this stock."

Q. (By MR. JOHNSON): Well, it is not necessary to detail them all, but what was it in substance?

MR. MORROW: If the Court please, we object to any evidence as to conversations had by the witness with Mr. Miller regarding the purchase of the stock in question, being the stock of the plaintiff, or other stock of the Idaho National Bank, about this time, on the ground that it is hearsay and incompetent, irrelevant, and immaterial to prove or disprove any of the issues in this case, the question being, under the pleadings, and being placed in issue, that at the time this telegram was sent and shortly thereafter Mr. Miller was ready and willing to purchase the plaintiff's stock, and we think that evidence as to what Mr. Miller may have told the witness is clearly hearsay, and object to it on that ground, and on the ground that no proper foundation has been laid for the introduction of such evidence.

THE COURT: What do you offer this for, Mr. Johnson?

MR. JOHNSON: We don't offer it for the purpose of proving what Mr. Miller's action might have been, but merely the facts leading up to the sending of this telegram as alleged in the complaint. We will offer other proof on the other question.

THE COURT: Well, with that understanding, I think I shall let it go in, as merely explanatory of the circumstances.

MR. JOHNSON: That is all right.

THE COURT: You may proceed.

WITNESS: What was the question?

THE COURT: Q. What were these conversations, in substance, your conversations with Mr. Miller?

A. Well, the conversation on the 30th of November I think was in 1917, that is, the day the message was sent, Mr. Miller wanted to know what stock I controlled and could deliver and I told him sixty-five shares, my stock and Czizek's stock. This conversation took place in Boise on the street. And I think later in the day Mr. Miller came up to my office, and we made an appointment for that evening, in the Idaho National Bank; and that evening we met in the Idaho National Bank, and there was present Mr. Miller and myself in the front end of the bank, and in the rear end of the bank Miss Nellie Wilson was present, and we took up the question of the stock, and he offered \$90.00 a share for the 65 shares, mine and Czizek's, and started to get a statement showing that that was all the stock was worth at that time, and stated that his purpose in getting the stock was so that he could control the bank, and if he didn't get the stock that the bank would go into liquidation, and it would be a year or eighteen months before we would get anything, and if the bank realized on all its papers and the surplus funds, the most we could hope to get would be \$110.00 a share, and we might not get anything. At that point I interrupted him, and I said, "Miller, there is no use in discussing the purchase of this stock unless

you have got the money to pay for it, a cash transaction." And as I recall it, there was a book lying on the counter—the desk run this way, and inside there was a long counter, and there was a book lying there. He says, "There is the books and there is Nellie," meaning Nellie Wilson. And I went over to Nellie, and I said, "Nellie, Miller is figuring on buying this stock." And she said, "Does that include Czizek's stock?" And I said, "Yes. Has Miller the money to pay for it?" She said, "Sell. He has got money enough here to take care of any check that he will issue for you." I got Czizek's address from Nellie. The bank had his address. And went back to Miller and pencilled a telegram and read it to Miller, and he said it was satisfactory, and I took it back to Nellie, and she run it off in triplicate. I came back to Miller and read the telegram, and I struck out one word and he added one word. The word I struck out was "here" and I wrote in ink "year". And he wrote in ink at the end of the message the word "answer".

MR. JOHNSON: I would like to have this marked as Plaintiff's Exhibit No. 1 for identification.

Said document was thereupon marked Plaintiff's Exhibit No. 1.

WITNESS: Plaintiff's Exhibit No. 1 for identification is a telegram, the telegram that I prepared in triplicate in the bank on that evening. It is one of the three. I gave one to Miller and I took the other two up to the office. I left one in the office and I gave the other to my son Felix and told him

to take it up to the telegraph office right away and pay the charges and send it.

Thereupon the paper marked Plaintiff's Exhibit No. 1 for identification was introduced and admitted in evidence, and which is in words and figures as follows, to-wit:

"November 30, 1917.

J. A. CZIZEK,
5767 Shafter Avenue,
Oakland, Calif.

"Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait (here) year and chances of liquidation says if fails to get two-thirds stock liquidation will follow will you take ninety dollars per share for yours I am inclined to accept offer for mine. Answer.

"T. J. JONES."

WITNESS: Mr. Miller wrote the word "answer" in pen at the end there on the telegram, and I struck out the word "here" and wrote "year". When I left the bank and took the two copies of the telegram up to my office, my son Felix Jones and I think his brother Tom were present in my office. I then gave the telegram to Felix and I think I put the other copy in the safe. I gave directions to my son Felix to take the telegram immediately to the telegraph office. First I told him to go to the safe and take sufficient money and to go to the telegraph office and send that telegram and prepay the charges. He then left with the telegram. My recollection is that

the 30th of November of that year was a Friday and that this was a Friday evening, and the next day Mr. Miller came up to the office and wanted to know if I had heard from Czizek and I told him no. He said he was very anxious to get this stock and any other stock that I had, and said we could go ahead and close the deal, and that if I didn't have the Czizek stock that could be put in later. He seemed to have the impression that I had the Czizek stock—and as to the probability of the message being delivered. I said, "Well, the company would have until noon to deliver the message and Czizek might not be in the house at the time, and we would leave it go until evening." Czizek's address that I got at the bank is the address that is on that telegram, in the city of Oakland, California. Continuing my conversation with Mr. Miller I said that the next day being Sunday intervening, it wouldn't really make very much difference, so on Sunday I requested Felix to go to the telegraph office and see if he could get any information with reference to that telegram, and he came back and reported that—

MR. MORROW: We object to what he reported.

THE COURT: Sustained.

MR. JOHNSON: That was merely, your Honor, not to suggest that the telegraph company made any such statements as that, but merely to show the connection of his conversation with Miller, explanatory, so that we could understand Miller's subsequent actions. I expect to offer other evidence as to what he told him.

THE COURT: Very well. With that understanding.

WITNESS: He reported to me that the telegraph office said the message had been delivered to Czizek at Oakland, California. That was what I told Mr. Miller. Then on Monday Mr. Miller came up and he wanted to know if I had heard anything from Czizek and I told him no. That would be Monday. That would be the 3rd of December. And he wanted to know if he was in town, and I said I had stopped at the Idanha and he wasn't there, and I went and called up the Idanha and they said he wasn't there. Miller said he thought he was on his way to Boise. I said I thought he was, too, having received that telegram and not having answered, that I thought he was on the way and had the stock with him. Then Miller said to me—

MR. MORROW: We object to further testimony as to what Mr. Miller may have said, on the ground that it is hearsay and incompetent. The evidence that has already gone in I think is merely explanatory, but anything further that was said must necessarily relate to matters arising after the telegram was sent, and, if relevant at all, would have to bear upon the issue of Miller's readiness and willingness to buy that stock at that time, on the 3rd day of December.

MR. JOHNSON: This is merely explanatory, if the Court please.

THE COURT: I think I shall let it go in. You may continue.

WITNESS: Miller said to me, "You transfer your stock"—my individual stock. That is the first time that I recall now that my individual stock came up. "I am going down to Salt Lake, and I will try and see Czizek, and if I do I will close with him there; and if I don't see him and he comes through, the money is in the bank. I have given instructions to the bank to turn the money over." The money could have been put, according to Miller's statement, could have been put to my credit or Czizek's. Miller was willing at any time to pay the money if I would agree to turn over the stock or see that it was turned over. I told him at that time that I wouldn't deliver my stock, that it was selling for less than par, and I wouldn't break my word to Czizek for \$1350.00, and he represented that at any time that Czizek and I would take the money and the stock would be delivered, that it would be paid for, that the bank would pay for it, all I had to do was to take it to the bank, or, if I preferred, the money would be placed to credit as I would designate. At that time I told Miller that I wouldn't sell my stock until Czizek's and mine went together. Yes, my office is in the same building as the bank. Later in the day Mr. Miller called me up and asked me to come down to the bank, and I think I went down, and Miller asked me if I had the stock with me, and I told him no; and we had another conversation about the stock, and he came up to the office, and he said that I was interfering with his plans by not closing the deal, and to that extent was hurting the bank, and that there couldn't be any

possible injury to Czizek or anybody else by closing the deal; and that he was going out of town, and he wanted the matter closed. I again refused to turn the stock over, but after he went out, in talking the matter over with Felix, I took my stock and went down to the bank. I said to Miller, "I have my stock." He said, "I am going out of the bank; put it on my table. When I come in I will give you a check or put the money to your credit." I went over to the table and put my stock on his table, unendorsed, and went down in the afternoon, and Miller was in the bank. And I said, "Miller, I left my stock on your table unendorsed." He said, "I wouldn't give you your check until it was endorsed." I said, "Neither would I endorse the stock until it was paid for; this is a business transaction. If you want the stock give me your check and I will endorse it." He wrote a check for \$1350.00, and I took the check over to the cashier and had it cashed and entered in my bank book, and went back and endorsed the stock.

I next saw the plaintiff, I think, about the middle of February, 1918. I met him at the corner of Ninth and Main streets in Boise, Idaho. I had a conversation with him there. After we had shook hands I said to him, "Why in hell didn't you answer my telegram?" He said, "What telegram?" I said, "That telegram that I sent you to Oakland. I had your stock sold." He said, "I never got the message." I said, "The office reported that it was delivered to you at Oakland, California." He said, "Did the office say that?" I said, "Yes." He said, "Let's go

up to the office." We went over to my office, and I gave him, Czizek, this triplicate of the telegram that I had in my office. Yes, I am sure about giving him this triplicate of the telegram I had in my office. And we went up to the telegraph office together, and Mr. Czizek asked for Mr. Hackett. Mr. Hackett came up to the counter. Mr. Hackett was supposed to be the manager of the Western Union. He had been there a long time. Czizek read this telegram to Hackett, and Hackett asked Czizek to let him see it, and Czizek handed it to him, and Hackett turned to go away with the telegram in his hand, and I objected, and he handed it back to Czizek and said he would look it up and let us know later. And Czizek and I left the telegraph office together. Either that day or the next day or the following day, within a day or two, I received a letter from Mr. Hackett and in that letter was enclosed a check or a draft for I think sixty-five cents; anyway it was the amount of money that Felix had paid for sending the message.

MR. JOHNSON: I will ask that this paper be marked as Plaintiff's Exhibit No. 2 for identification.

Said paper was thereupon marked Plaintiff's Exhibit No. 2.

WITNESS: This paper marked Plaintiff's Exhibit No. 2 for identification is the letter that I received from Mr. Hackett enclosing check. I am not sure whether it was a check or a draft for sixty-five cents. Yes, that is the original letter.

Thereupon the letter was offered and received in

evidence, and marked Plaintiff's Exhibit No. 2, and is in words and figures as follows:

(Letterhead of Western Union Telegraph Co.)

"Boise, Idaho, Feb. 14, 1918.

"T. J. Jones, Atty at Law,

"Boise, Idaho.

"Dear Sir:—

"I find on investigation that the message you filed with us on Nov. 30th, 1917, addressed to J. A. Czizek, Oakland, failed in transmission.

"The employees concerned in the failure will be vigorously disciplined.

"I am sure it is unnecessary for me to say the unfortunate occurrence and any inconvenience it may have caused are very much regretted, and, in accordance with our custom in such cases, I enclose herewith the amount paid as tolls.

"Yours truly,

"G. H. HACKETT, Manager."

WITNESS: Either the day that I received the letter and check or the next day or maybe the day after that, I wrote Mr. Hackett a letter returning the check or draft, whichever it was. I kept a duplicate of that letter.

Thereupon, Plaintiff's Exhibit No. 3 was offered and introduced in evidence, and is in words and figures, following:

"JONES & JONES

Lawyers

BOISE, IDAHO,

"Feb. 18, 1918.

"The Western Union Telegraph Co.,

"G. H. Hackett, Manager.

"South 8th St., Boise, Idaho.

"Gentlemen:—

"Your letter of Feb. 14, 1918, to hand, containing your check No. 62 dated Boise, Idaho, Feb. 14, 1918, on First National Bank of Idaho, Boise, Idaho, payable to the order of T. J. Jones in the sum of \$0.65.

"Toll paid on message filed in your Boise office Nov. 30, 1917, addressed to J. C. Czizek, Oakland, Cal., which you say failed in transmission.

"An acceptance of the check on my part might be construed as a settlement of the matter. I therefore return check to you.

"Yours truly,

"T. J. JONES."

WITNESS: After I had replied to Mr. Hackett's letter returning the check or draft, whichever it was, Mr. Hackett came up to my office and he said he was General Manager of the Company at that time. He said, "Mr. Jones, I came up to talk to you about the Czizek telegram that failed in transmission, and I would like to ask you some questions." I said, "All right." He said, "It is unfortunate that it didn't go through, and the company will settle it.

There is no question about their liability," or words to that effect.

MR. MORROW: We move to strike out the last statement about liability, because it is a conclusion.

MR. JOHNSON: It isn't binding on the company—we realize that, your Honor. It is merely explanatory.

THE COURT: Very well.

WITNESS: He said, "The amount that Czizek would be entitled to would be the difference between the value of the stock—

THE COURT: Well, now, apparently this isn't very material, do you think?

MR. JOHNSON: It is only material as to what follows, your Honor, with reference to some further questions that he asked him. And then it has a materiality in this way, in connection with some further facts that I intended to prove, in an attempt to show a waiver by the company of the sixty-day provision set up as a defense, this among various other circumstances which I will argue to the Court constituted the waiver. This is just one circumstance connected with others, and while possibly of itself it would be subject to the objection, I thought that after the testimony was in the Court could give it such legal effect as he thought necessary, as long as this case wasn't being tried before a jury, and I would introduce it.

MR. MORROW: We wish to make the further objection that it is apparently—it didn't develop until this last statement—that it is an offer or some

negotiations concerning a compromise of the claim, and I don't think that is admissible.

MR. JOHNSON: Well, it isn't seeking to establish that the company has admitted its liability.

THE COURT: I would be quite clear that it isn't proper evidence at the present time if you were trying the case before a jury. Isn't it more properly rebuttal if you are offering it only for the purpose suggested, a waiver of that defense?

MR. JOHNSON: Possibly it would be, Your Honor, more in the nature of rebuttal, but if that particular objection isn't raised, I would like to have Mr. Jones testify at this time, because his health is very poor and he has to leave here in a very short time.

MR. MORROW: We wouldn't care to make the objection, in view of that situation, Your Honor, on the ground that it is properly rebuttal, but I want to call attention to the further fact that the contract provides that no employe is authorized to vary the foregoing provisions, including the sixty-day provision, so the only possible competency of this evidence would be on the ground of this question of waiver, and I think that is sufficiently clear upon that provision, that Mr. Hackett couldn't waive that by any statement he might make.

MR. JOHNSON: I realize that there is perhaps a question of law there, which perhaps we would better take up in the argument of the case. There are some authorities that hold that a manager can waive those provisions, and there are numerous

other matters in connection with the waiver that I think should perhaps all be taken together, and the Court can give them the legal effect necessary.

THE COURT: Well, perhaps we can get at it more directly and more briefly in that way. You may proceed.

MR. JOHNSON: Q. Go ahead.

WITNESS: What was the last question?

MR. MORROW: Do I understand the objection is overruled?

THE COURT: No. The testimony will be admitted, subject to the objection.

The last question was read to the witness.

WITNESS: He said, "Isn't that correct?" I said, "Yes." He said, "The amount that Czizek would be entitled to would be the difference between the value of the stock and the amount Miller offered. Isn't that correct?" I said, "Yes." He asked me what the stock was worth and I referred him to Mr. Streeter, the cashier. He said, "I would like for you (meaning me) to fix the value, as I think you would be fair, and I have taken this matter up with the company." He said, "As I understand it, the banks have guaranteed the depositors, and there can't be any liability attach to the stockholders." I said that statement was only partially correct, that instead of the stock being worth something, the liability might attach to the stockholders, as the banks had only guaranteed the depositors, and hadn't guaranteed any of the indebtedness of the bank, if there was any. Well, I think that that was all that was

said at that time that related particularly to this matter. If I had any further conversation with him after that time, I do not recall.

CROSS EXAMINATION, by Mr. Morrow:

WITNESS: The date on which I sold my stock and got this check was the 4th of December, 1917. No, this telegram was not written in my office at all. It was written down at the bank, in triplicate. We used that blank of the company, the same as that one that was introduced in evidence, for all three of the telegrams. All three of them were on the same form as Plaintiff's Exhibit No. 1. I think they were on the same form. I know the wording was the same in all of them.

MR. MORROW: Will you mark that as Defendant's Exhibit A?

A certain paper was thereupon marked Defendant's Exhibit A, which was read by Mr. Morrow to the witness, and is in words and figures the same as Plaintiff's Exhibit No. 1.

WITNESS: Yes, these two are part of the three triplicates. These two are two of the three triplicates.

(Witness excused.)

J. A. Czizek, the plaintiff, produced as a witness on his own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION, by Mr. Johnson:

WITNESS: My name is J. A. Czizek, my age 55, my residence Oakland, California. I am acquainted with a bank known as the Idaho National

Bank. I am a stockholder in that bank. I own fifty shares of stock. The par value of that stock is \$100. I owned fifty shares of stock in the month of November, 1917. I was acquainted at that time with one David Miller, and also with T. J. Jones, the witness that just testified. I came from my operations in central Idaho to Boise along about the middle of November, I would judge, in the year 1917. Prior to this I had received several communications from Mr. Miller about things generally with reference to bank, etc., and the question of purchasing the stock or entering into a merger with the Pacific National Bank that he talked to me about, was discussed. I told him I didn't want to enter into any merger, that I wanted to sell my stock. I had had some bad bank stock experience, and I didn't want to have the stock. We discussed the value of it pro and con for a little while and didn't arrive at anything, because I learned that he was not ready just then to buy it, but he told me he was going away and that he would be back at a certain time, or near a certain time, when he would be ready to negotiate with me further, and we would have no trouble about agreeing on the price, and he would buy my stock. Yes, I had a conversation after that with Mr. T. J. Jones with reference to this matter. After Miller and I had our talk, I went to Mr. Jones, who was also a stockholder, that I knew, and we had talked about this matter more or less at different times, and told him what Mr. Miller told me, that he would be back with the money to buy our stock, and this merger that

he talked of, and that I wanted him to negotiate with him for me, that we would sell together. He wished to buy both our holdings together. I afterwards told Mr. Miller after talking with Mr. Jones, that Mr. Jones could negotiate for me, and I left for California. I left Boise within a day or two after that. My address was always in the Idaho National Bank. My Oakland address at that time was 5767 Shafter Avenue, Oakland. I was at my home in Oakland continuously between November 30, 1917, until about shortly after the first of February, excepting little drives out in the country. I did not receive any telegram from Mr. T. J. Jones. I received nothing with reference to the bank stock.

Q. If you had received that telegram, Plaintiff's Exhibit No. 1, what would have been your attitude with reference to your stock?

MR. MORROW: If the Court please, we object to evidence as to what his attitude would have been, on the ground that it is incompetent, irrelevant, and immaterial. I would like to state that objection a little more in detail, if the Court please. And particularly for the following reasons: Because the witness is asked his present opinion on a past condition of things that never existed, but is now summoned before his mind as conjecture. He is asking the present opinion of the witness as to what he would or would not have done in a stated contingency. It is contrary to public policy, as tending to encourage corrupt testimony, and has a vicious tendency. The allegations of the complaint show

that plaintiff did not suffer any actual loss other than a possible opportunity, for which a recovery is precluded under the law. The telegram shows that the sender was asking information or advice as to whether or not he should sell his own stock. The telegram is in evidence, and the Court can determine that. The complaint shows that there was no obligation out of which any loss could have resulted. The damages sought are too uncertain, contingent, and remote, to render any testimony in relation thereto competent. The sale of said stock depended upon the independent will of the plaintiff, and that was a contingency that precludes recovery and renders the testimony incompetent. And the sale of the stock also depended on the independent will and ability of the party referred to, David Miller, to purchase the stock, and that also is a contingency which precludes recovery and renders the testimony incompetent. In other words, Your Honor, we are objecting to any evidence as to what this witness' attitude would have been if he had received this telegram, because he has just testified that he didn't receive it. And if the Court cares to go into this matter at this time we have the authorities I think that amply sustain our position.

THE COURT: I think I shall receive the testimony subject to the objection. It may be rather a nice question as to whether it is competent. You may proceed.

MR. JOHNSON: Go ahead, Mr. Czizek.

WITNESS: The question, please.

(Question read.)

A. I would have sold it. I was seeking to sell it.

Q. What would your reply have been to the telegram if you had received it and answered it?

A. To accept it.

MR. MORROW: May it be understood that this same objection goes to all this class of testimony?

THE COURT: Yes.

A. I should have wired a reply of acceptance.

The Court afterwards sustained defendant's objection to the above testimony, and held and decided that the evidence was insufficient to support a finding that plaintiff suffered any damages as a result of his failure to receive the telegram, and was insufficient to show that plaintiff would have accepted the offer. To which ruling plaintiff was allowed an exception by the Court.

WITNESS: After that time I returned to Boise about the 13th or 14th of February, 1918. I had not seen Mr. Miller in the meantime. I saw Mr. Jones after my return to Boise. I am not certain whether it was the same day I arrived or the following day, I met Mr. Jones on the street. He immediately wanted to know why I didn't reply to a message he sent me about the bank stock. I told him I hadn't received any message about the bank stock. Well, he had sent me a message and everything was all fixed. And among other things, he invited me to his office and showed me a copy of a message he had sent, or a message that was supposed to have been sent to me. We discussed the thing a little bit,

and I suggested that we go down and see Mr. Hackett. We went down to the telegraph office and I called for Mr. Hackett personally and discussed the matter with him. I was very well acquainted with Mr. Hackett for twenty years or more. Well, Mr. Hackett felt rather bad about this, and I was a little bit angry. Well, that was about all there was to it. We left the office and he said that he would look it up and find out who was to blame. Yes, he handed me a telegram—returned me one. I don't know whether it was the original or whether it was a copy, I am not certain. But he promised to take the matter up and I let it go at that, and he did later on. I think I gave the telegram that he handed me to Mr. Jones for safekeeping, or something. We took it with us. Yes, that was the telegram that was introduced in evidence, marked Plaintiff's Exhibit No. 1. That is the only one I know anything about, supposed to be a copy of the original. I afterwards gave it to my attorney in this suit. No, I am not clear on the point at this time whether it is the one Mr. Jones had or whether it was the original that Mr. Hackett had. The next occurrence that I recall with reference to this dispatch was, I was called into Mr. Jones' office and he showed me a letter that he had received from Mr. Hackett. That was a day or two later. I don't know whether it was the following day, but it was shortly after I had talked to Mr. Hackett. He said, "I have got a sixty-five cent check or draft here." And we decided we shouldn't accept it, to send that back. Yes, that was the letter

that was introduced, marked Plaintiff's Exhibit No. 2, the letter from Mr. Hackett to Mr. Jones. I don't think Mr. Miller was in Boise at that time. No, I am quite satisfied he wasn't, because I would have seen him. Yes, I received a communication from the defendant at that time—an agent, or somebody in Salt Lake, an attorney or somebody from Salt Lake I think it was. I addressed a communication to the defendant company, and I kept a copy of it. This was, I think, at the suggestion of Mr. Hackett, and set forth the case as well as I could to this attorney, I think it was, in Salt Lake.

A certain document was thereupon marked Plaintiff's Exhibit No. 4 for identification.

WITNESS: This is the original letter I addressed to the agent or the manager at Boise, for the attention of Mr. Hackett of the Western Union Company. That was done at the suggestion of Mr. Hackett, and I think he sent it on, at least I got a reply from Salt Lake City.

Thereupon, the paper marked Plaintiff's Exhibit No. 4 for identification was offered in evidence.

MR. MORROW: We would object to this, for any other purpose than that of showing that a claim in writing was made to the company on this date, and for the reason that a number of statements therein are self-serving, and further the general objection to the testimony relating to what the plaintiff would have done if he had received the telegram, the same objection that we made a few minutes ago to other testimony along that line.

THE COURT: Well, it will be received only for the purpose suggested.

MR. JOHNSON: Yes; it is only for the purpose of showing, Your Honor, that a claim in writing was made on that date.

MR. MORROW: Well, it is competent for that.

MR. JOHNSON: I will read it to the Court.

THE COURT: That is unnecessary. If you will just let me have it.

MR. JOHNSON: All right.

Plaintiff's Exhibit No. 4 was thereupon admitted in evidence, and is in words and figures as follows:

"Boise, Idaho, June 18, 1918.

"Western Union Telegraph Company,

"Boise, Idaho.

(Attention Mr. Hackett, Manager.)

"Gentlemen:

"After complete investigation, I find that on the 30th day of November, 1917, a telegram was addressed to me, properly directed to my address, 5767 Shafter Avenue, Oakland, California.

"The letter advised me of the opportunity to sell fifty (50) shares of my stock in the Idaho National Bank at a price of Ninety Dollars a share or a total of Four Thousand Five Hundred Dollars.

"I was extremely desirous of selling this stock and this offer would have been immediately accepted if this telegram had been delivered to me.

"It was sent to me by my associate and agent,

Mr. T. J. Jones of Boise, Idaho.

"After being delivered to your Company the price of the telegram was paid by Mr. Jones for me, and instead of the telegram being sent it was pigeon holed in Boise, although on December 2, 1917, there being no response to Mr. Jones' inquiry, he sent his son to the telegraph office to ascertain whether the message had been sent, and Mr. Jones was informed by one of the employes of the office that the message had been delivered.

"Again, on December 3, 1917, Mr. Jones' son, Felix T. Jones, went to the office in Boise, Idaho, and inquired about the delivery of the message, and your employee specifically replied that the message had been sent and delivered to you on December 1, 1917.

"Whereupon Mr. Jones decided that I did not care to sell my stock, and the opportunity for selling it passed.

"I was not aware of the transmission of this telegram until my return to Boise, about the middle of February, 1918, at which time, in company with Mr. Jones and his son, we went to the Western Union office and there found that the message had never been sent to me, but was still in the office. Whereupon Mr. Hackett delivered to me the original message, which I now have in my possession.

"He also attempted to return the toll, and the next day sent your check No. 62 in the sum

of Sixty-five cents. This check was refused and Mr. Jones returned it saying that he did not care in any way to waive any claims which might arise for damages.

"I now demand, by reason of your negligence, the sum of \$4500.00, with interest thereon at the rate of seven per cent per annum from and after the 9th day of December, 1917. Unless this matter can be settled and adjusted I will be obliged to seek my remedy in the Court.

"Please address me c/o Overland National Bank, Boise, Idaho.

"Yours very truly,

(Signed)

"J. A. CZIZEK."

WITNESS: Yes, I received a reply to that communication.

Thereupon an envelope was marked Plaintiff's Exhibit No. 5 for identification, and a letter was marked Plaintiff's Exhibit No. 6 for identification.

WITNESS: No. 5 is an envelope addressed to me from Salt Lake City, and contains this letter, Exhibit No. 6, which seems to be a reply to my letter and is signed by U. G. Life, District Commercial Superintendent.

Thereupon, Plaintiff's Exhibits Nos. 5 and 6 for identification were offered in evidence.

MR. MORROW: I don't think it is material, but there is no particular objection. The objection rather goes to the weight of it.

Thereupon, these exhibits were admitted in evidence and were marked Plaintiff's Exhibits Nos. 5

and 6 respectively. Plaintiff's Exhibit No. 5 is an envelope upon which is printed, in the upper left hand corner, the return card of the Western Union Telegraph Company, Salt Lake City, and the name Mr. J. A. Czizek, Care Overland Natl. Bank, Boise, Idaho, is printed on the envelope, and a pencil line is drawn through the words Care Overland Natl. Bank, Boise, Idaho, and the address, Warren, Idaho, in pencil written in place thereof. Plaintiff's Exhibit No. 6 is in words and figures following, to-wit:

“THE WESTERN UNION TELEGRAPH COMPANY
“Mountain Division”

“U. G. Life,

“District Commercial Superintendent.

“Salt Lake City Utah, July 2, 1918.

“Mr. J. A. Czizek,

c/o Overland National Bank,

“Boise, Idaho.

“Dear Sir:

“Acknowledging receipt your favor June 18 addressed this Company, Boise, Ida., making claim against the Company for \$4500.00 alleged loss sustained by alleged failure in transmission message filed Nov. 30, 1917 addressed to yourself at Oakland, Cal., signed T. J. Jones; beg to advise this matter has been taken under immediate investigation upon conclusion of which you will be communicated with further.

“However, more than 60 days having elapsed since date claim message was filed, our investigation will be conducted without prejudice to

the situation created by your failure to bring matter to our attention at an earlier date.

“Yours truly,

(Signed) “U. G. LIFE, Dist. Com’l Supt.”

MR. JOHNSON: Here is a letter that perhaps should have come before the other two. I will ask that this letter be marked as Plaintiff’s Exhibit 7.

Said letter was thereupon marked Plaintiff’s Exhibit No. 7.

WITNESS: This paper marked Plaintiff’s Exhibit No. 7 is a letter from Mr. Hackett that prompted the writing of that letter there, Plaintiff’s Exhibit 4. That was received prior to my writing that letter, and was received by me.

Thereupon Plaintiff’s Exhibit No. 7 was offered and received in evidence without objection, and is in words and figures following, to-wit:

“THE WESTERN UNION TELEGRAPH COMPANY

“Incorporated

“Manager’s Office, Boise, Ida., June 19, 1918.

“J. A. Czizek,

“Boise, Idaho.

“Dear Sir:

“Your favor 18th instant received and I have forwarded same to our Company for consideration. Am I to understand that the stock has no value at present? Was there not some value to the stock when you first discovered the message had not been sent about the middle of February when you returned to Boise?

“Yours truly,

(Signed) “G. H. HACKETT, Manager.”

The Court held that the foregoing testimony relating to the statement and communications of Mr. Hackett, Manager, to Mr. T. J. Jones and to plaintiff, and the letter from Mr. Life, district superintendent, did not constitute a waiver by defendant of the clause on the telegraph blank which provides that the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within 60 days after the telegram is filed with the company for transmission, to which ruling of the Court plaintiff was duly allowed an exception.

CROSS EXAMINATION By Mr. Morrow:

WITNESS: On November 30th, 1917, about that time, this bank stock was in Oakland. It was in the Bank of Italy. It was there with other collateral at the time, for a loan. No, not the Bank of Italy in San Francisco, in Oakland. Well, I beg your pardon, at that time that was the Security Bank. It is now a branch of the Bank of Italy, taken over by the Bank of Italy since. It was then known as the Security Bank.

RE-DIRECT EXAMINATION By Mr. Johnson:

WITNESS: Yes, sir, at that time this bank stock that I owned in the Idaho National was available to me to sell. I was in a position to deliver the stock at any time.

Yes, I could have obtained it from the bank.

RE-CROSS EXAMINATION By Mr. Morrow:

WITNESS: Yes, I know what the time for a letter between Oakland and Boise is. The ordinary

time of sending a letter. A letter leaving Oakland to Boise should arrive here in 48 hours without any trouble, probably less. The train leaves Oakland at ten o'clock in the morning and you are here the following morning by four o'clock, the second morning.

The Court thereafter held that this evidence was insufficient to show that plaintiff could have gotten his stock which was held in a bank in Oakland, as collateral, to Boise in time to have accepted Miller's offer, even if the telegram had been sent and delivered, to which ruling of the Court plaintiff was duly allowed an exception.

(Witness excused.)

Felix T. Jones, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION By Mr. Johnson:

WITNESS: My name is Felix T. Jones, my age 27, my residence Boise City, Idaho, my occupation is attorney. I am at present holding the position of police judge with the City. I am a son of T. J. Jones, and was his former law partner. I am acquainted with one David Miller. I was present at a conversation in the latter part of November, 1917, at the Idaho National Bank, at which my father and Mr. Miller were present. At the time, they were speaking of the stock, speaking of 65 shares of stock, and at that time Mr. Miller made an offer of \$85.00 per share for the stock, which was refused. Mr. Miller made the statement that he had bought other stock at a cheaper price, and that was about the substance

of the conversation. His offer was refused. I was in my father's office on or about the 30th of November, 1917, in the afternoon or towards evening. I was up there alone, and my father came in presently with two telegrams, that is, it was two messages, two duplicate messages, and requested that I take it over and send it to J. A. Czizek. He told me to take the money out of the safe and send the message to Czizek.

(Witness handed papers marked Plaintiff's Exhibit No. 1.)

WITNESS: That was one of the messages. I can't say whether that is the original or one of the duplicates. It is one of the telegrams. I took it down to the telegraph office and gave it to the operator. I asked him what the charges would be, and he stated that the charge was sixty-five cents. I told him to send the message to J. A. Czizek at Oakland. I prepaid it. The message was stamped, or I think the first one I gave the message to was May Eagan—of that I am not positive—I think I gave the message to May Eagan. Her name is now May Russell. She was the girl behind the desk. And she was the person I gave the message to. I left it with her, prepaid the charges, and left. I then came back to the office. After leaving the telegram there I came back to our office in the Yates Building. At the request of my father, I went to the telegraph office, I believe on the first of December, which I think was a Saturday, and asked if there was a message there for Jones. She said no, and then I asked her if they

had sent a telegram, to look through and see if a telegram had been sent to J. A. Czizek at Oakland.

MR. MORROW: Just a moment. We object to any further testimony from this witness regarding the conversation that he had with the employees of the company, for the reason that there is an attempt apparently in the complaint to lay a basis for an action of deceit. In paragraphs 7 and 8 it is alleged in substance that the present witness, at the request of his father, made several inquiries at the office as to whether the message had been sent, and was informed that the message had been sent, and that the said T. J. Jones relied upon and believed those statement. Now if those allegations are material for any purpose it would be as laying a foundation for an action on the ground of deceit, and the fundamentals of that action are not alleged, particularly there is no allegation of any intent to deceive, and there is no allegation that the employe making any representations concerning that telegram can or ought to have known the facts, and there is no showing of any authority by any employe to make representations concerning the delivery of a telegram, unless in case the sender asks for a report of delivery, which was not done in this case. In that event, under the rules of the company, the receiving office would wire back that it was delivered. But if counsel is seeking to put this in for the purpose of showing the essentials of an action for deceit we think his complaint is radically defective, because he hasn't pleaded it on that theory, and he hasn't pleaded either that there

was any intent to deceive, or that there was any knowledge of the falsity of any representation that has been made, and I don't think it is necessary to cite authority upon the point that there is no liability for mere innocent misrepresentations.

MR. JOHNSON: If Your Honor please, it goes to the question of the negligence of the company, it seems to me.

THE COURT: No. The negligence is in not delivering the message.

MR. JOHNSON: Well, also in the employes of the company informing him that it had been delivered, so as not to make it necessary, or to show that the plaintiff was not negligent, that is, Mr. Jones, in not communicating further with him.

THE COURT: Well, for that purpose it may go in.

(Question read.)

WITNESS: She looked through some papers and files, and said the telegram had been sent. Well, Sunday came on and it was my opinion, if I remember right—it seems that the next day was Sunday, and on Sunday I went to the telegraph office again. I am positive it was Sunday—this being the first—the 30th was a Friday—Saturday was the first—the second was a Sunday. I guess I went on the third, a Monday, to the telegraph office and inquired if the telegram had been sent to J. A. Czizek, at Oakland, at which they looked through some more files, and the person behind the desk replied that J. A. Czizek had received the telegram, and with that I walked

out. I was present at my father's office after that time, when a conversation took place between my father and David Miller with reference to this stock. Miller came up to the office and asked if we had heard from Czizek. I think that was about ten or ten-thirty in the morning, I think about that time. That would be the fourth. And asked if we had heard from Czizek, to which we replied no, and then he stated that he doubted, that he considered, that he thought we were holding the Czizek stock up, in other words, that he thought we had the 65 shares of stock at that time, and we told him no, and then he questioned us as to whether we had sent the message or not, and that was about all the conversation.

CROSS EXAMINATION By Mr. Morrow:

WITNESS: If Czizek answered the telegram, I suppose Czizek would have sent the telegram to T. J. Jones. I don't remember whether the clerk made any inquiry or any notation upon the telegram.

(Defendant's Exhibit A handed to witness.)

WITNESS: The telegram which I hold in my hand at the present time, I believe is the one that I gave to the operator, because these letters here, "454 Yates B." and the "408-W", that is not my writing. It is not my father's writing. I can't say in this particular message—I don't remember whether the clerk asked about our telephone number, but it is customary when you take a message there as a rule, that they usually put your address, and put a scroll around it. I don't think it makes any difference whether you ask for an answer or not. I am not

a customer in the office to any great extent, but I don't think that makes any difference. Now, as to this conversation that I had at the telegraph office after the telegram had been sent—there was a conversation on a Saturday. The first conversation was on the first, almost twenty-four hours had elapsed. Then the second conversation—yes, the telegram was sent on the 30th. I went there first on the 30th and then again on the first, which was almost twenty-four hours after I had taken the telegram down and given it to them to be sent to Czizek. Yes, that would be some time Saturday afternoon. The exact wording of the first statement that was made to me was that the message had been sent to Czizek. Yes, that the message had been sent to Czizek. The way the question was worded, there is no question in my mind, the way they put it, that they told me, that they gave me to understand, that Czizek had received the telegram. As near as I can recall the exact language, that was the exact language, that J. A. Czizek of Oakland had received the telegram. That is the exact language as near as I can recall. Yes, I paid the charge of sixty-five cents.

(Witness excused.)

The Court took a recess until 2 o'clock P. M.

2 P. M., Saturday, February 28, 1920.

By permission of the Court, J. A. Czizek, the plaintiff, was recalled for further examination and testified as follows:

DIRECT EXAMINATION By Mr. Johnson:

WITNESS: Yes, sir, I stated that I am still the

owner of the fifty shares of bank stock of the Idaho National Bank referred to in the complaint. Well, with reference to disposing of the stock after the middle of February, 1917, when I first learned that this telegram had been sent, I heard a great deal about the plan to merge, and the value of the stock to me seemed to be dependent on selling it, and there was at that time—Mr. Miller wasn't here, and I heard it had fallen through, that his merger plan had fallen through, or whatever they had in view. I don't know as to the details of that, but Mr. Jones and I discussed it a great deal, and he seemed to think there was nothing more to be done about that merger, and I didn't know where there was a market for it. In fact, I didn't attempt to sell it to anyone else at that time. Well, I didn't know anything of its value other than on one or two occasions I asked Mr. Streeter, who was the cashier, what he thought it was worth. I will venture the statement that I asked him two or three times, but he wouldn't fix it. In fact, his statements to me were very discouraging as to its value. The bank ceased to operate as a bank. Some time following that time I went to the mine, and I received, I think, a notice to attend a meeting, for the purpose of liquidating, or something of that kind. I just can't recall what that notice was or how it read, but I didn't pay much attention to it; I was busy, but later I learned that they were liquidating, and it was in the Overland National. After that time I knew of no market for the stock. I doubt whether there was any.

CROSS EXAMINATION By Mr. Morrow:

WITNESS: No, I don't think I attempted to sell the stock to anyone else after I came back in February. Mr. Miller I don't think was there. I didn't see him until June of that year. I went home, and he telegraphed me at Oakland, and I met him at Salt Lake by appointment on entirely another matter. In fact the matter pertained to the purchase of mining interests that he had. I came here to Boise with him for the purpose of consummating that deal. I did not make any further attempt to sell the stock. In fact, I have never made any attempt to sell the stock, prior to Mr. Miller, and told Mr. Fletcher prior to his death that I would like to dispose of it when I left Idaho.

RE-DIRECT EXAMINATION By Mr. Johnson:

WITNESS: No, I know nothing regarding its value of whether I could have sold it or whether it had any market value. I was rather discouraged on the showing that the books seemed to make, and that Mr. Streeter gave me. I depended on what he told me. Yes, I made some investigations with a view to ascertaining its value. I think I went to Mr. Streeter once or twice. In fact, I used to discuss these things with him every once in a while.

(Witness excused.)

H. L. Streeter, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION By Mr. Johnson:

WITNESS: My name is H. L. Streeter. I reside

in Boise. I was connected with the Idaho National Bank as cashier from October 1st, 1917, until the present time. I am still acting in that capacity, and as such I have charge of the books and records of the bank. I have with me a portion of the individual ledger that will show the balance of David Miller in the bank at the close of business on November 30th, 1917. Mr. Miller's balance in the Idaho National Bank at the close of business on November 30th, 1917, was \$84,003.57. His balance at the close of business on December 1, 1917, was \$33,943.11. His balance at the close of business on Monday, December 3rd, 1917, was \$30,826.50. And his balance in that bank at the close of business on December 4, 1917, was \$30,818.41. I was acquainted with David Miller to a certain extent. He occupied the position of vice president in that bank at that time. Well, yes, he had purchased stock in the bank prior to that time. He was a stockholder in the bank when I went in. I have the stock ledger here, which would show the stock purchased by Mr. Miller in the bank on various dates, and which would show the date that the certificates were transferred and recorded. The record shows that on May 25, 1917, certificate No. 106 was issued for 10 shares. Yes, these are certificates that were issued to David Miller. June 25, certificate No. 107 for 50 shares. On the same date, certificate No. 108 for 50; 109, for 50; 110, for 25; 111, for 25. On October 25, certificate No. 114 for 265 shares. November 30, certificate No. 119, for 265 shares. December 10, certificate No. 121 for

50 shares. That is the last certificate that was issued to Mr. Miller. These were all in 1917. The total capital of the bank was \$100,000, and the par value was \$100.00. Since the 14th of February, 1917, I don't think there were any transfers of stock in the Idaho National Bank. I don't think there have been any transfers since then. The book doesn't show any that I recall. The Idaho National Bank still has its charter, but there is nothing being done but collecting the assets and paying off the liabilities. It is practically in process of liquidation, and I have charge of those affairs. Well, in my judgment, from my knowledge of the affairs of the bank, the value to the stockholders of the stock in the bank at the present time is purely an estimate, but I doubt if there will be anything left for the stockholders after the liabilities are paid. Well, I should judge that that has been practically the condition of the bank since the middle of February, 1918.

CROSS EXAMINATION By Mr. Morrow:

WITNESS: Yes, I said that on the 10th of December, 1917, certificate No. 121 was issued to Mr. Miller for 50 shares. On December 10th, 1917, it shows that certificate No. 109 was cancelled for 50 shares. There is no such certificate that shows the transfer of the 15 shares that stood in the name of T. J. Jones, to Mr. Miller. That is, no certificate issued to Mr. Miller for 15 shares. The record shows that certificates held or issued to T. J. Jones were cancelled on December 6th, 1917. Three certificates of five shares each, Nos. 4, 55 and 62 for five shares

each. On December 6, 1917.

The balance in favor of Mr. Miller on the 28th of November, 1917 at the close of business, was \$1245.95. Yes, on the 30th of November there were some considerable deposits to Mr. Miller's credit. The items are as follows: an item of \$294.40; an item of \$130,000.00; an item of \$750.00. On the 1st of December, the deposits there to Mr. Miller's credit were, \$164.60; \$440.00; \$20,000.00. And the balance at the close of business on that day, December 1st, was \$33,943.11. At the close of business on the 5th of December, Mr. Miller's account shows an overdraft of \$20,978.76. The deposits in Mr. Miller's account on the 6th of December, 1917 show \$147.10; \$3,000.00; \$20,000.00, and the balance in his account on the 6th of December at the close of business was \$1,212.77. At the first of that day, he had an overdraft of \$21,787.23, and the balance at the close of business was \$1,212.77. From the 6th to the 10th of December, the maximum balance in his account on any of those days was \$952.69. On February 5th he had a balance of \$1353.41, and on March 1st he had a balance of \$1264.81. Those are the maximum balances during that period.

(Witness excused.)

Nellie M. Wilson, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION By Mr. Johnson:

WITNESS: My name is Nellie M. Wilson, I reside in Boise, and was formerly an employe of the

Idaho National Bank. I was employed in the capacity of stenographer and bookkeeper. I was connected with the bank ten years and eleven months. I was employed at the bank in November, 1917. I was acquainted with David Miler. He was vice president of the bank. I am acquainted with Mr. T. J. Jones. I was in the bank on or about the 30th of November, 1917, after the banking hours, when Mr. Miller and Mr. Jones were there. I was working on the books one evening when Mr. Jones came back and asked me if I would write a telegram for him, and I told him I would, and I got the blank and sat down at the typewriter. I think that Plaintiff's Exhibit No. 1 is one of the telegrams that I typed. It is the same contents.

Q. What did you do with them after you had typed them?

THE COURT: Do you think that is important, to go over that?

MR. JOHNSON: It was merely leading up to some information that Mr. Miller wanted. I don't know that it is very material, any more than to show that Mr. Miller was very anxious to have the telegram go, and that he afterwards asked her if it was sent, etc., to show that he was personally interested.

THE COURT: All right.

WITNESS: Yes, as I remember, Mr. Jones took the telegrams and went out of the bank with them. Yes, after that I had a talk with Mr. Miller with reference to these telegrams. He came in a little

later and asked me if Mr. Jones had written a telegram to Mr. Czizek, and if it had been sent.

(Witness excused.)

L. C. Flora, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION By Mr. Johnson:

WITNESS: My name is L. C. Flora. At the present time I am local manager of the Boise office of the Western Union. I am acquainted with Mr. Life, in Salt Lake. He occupies the position of district commercial superintendent, and has jurisdiction over this territory at Boise. If a claim is presented to me for damages growing out of the sending of telegrams, if it comes within a certain amount, managers investigate the claims and pay them locally, that is for sums, certain sums. If they are more than that, the facts are gathered locally and turned over to the district commercial superintendent, who has greater authority in the matter of the settlement of them. In amounts of \$25.00 or over, I send them to the district manager in Salt Lake. These are the instructions that I have from the company.

CROSS EXAMINATION By Mr. Morrow:

WITNESS: Mr. G. H. Hackett was my predecessor as local manager. I can't say positively whether his authority with regard to claims was the same as mine or not, because of the fact that the routine in that respect has been changed slightly, and I believe that it is since 1917. They were approximately the same as my instructions. I have been local manager since November 9, 1918. As best

I can remember, this change of the rules was made some time in 1917. It was simply raising the authority, however, for the office. Yes, for the local office. It was previously, I believe, \$10.00. I have been with the Western Union Company about fifteen years.

RE-DIRECT EXAMINATION By Mr. Johnson:

WITNESS: I know the instructions that I had, which were naturally general, and which covered amounts up to \$10.00 for offices of this size. No, I wasn't here at the time Mr. Hackett was manager. I have no direct knowledge of what his instructions and authority were other than our rules are universal. Of course, as regards specific authority I don't know. Yes, the rules of all of the local managers throughout the country are practically the same.

(Witness excused.)

Plaintiff rests.

THEREUPON, the following evidence was offered on behalf of defendant:

MR. MORROW: We offer Defendant's Exhibit No. A in evidence, being a telegram identified by two witnesses on cross examination.

Thereupon the paper was admitted in evidence, and is a duplicate verbatim copy of Plaintiff's Exhibit No. 1, with the addition of a pencil notation in the upper right hand corner of MB and 49 pdnl, and pencil notation in the lower right hand corner, 454 Yates B, and .65c 408-W.

Thereupon a certain paper was marked Defend-

ant's Exhibit B and offered in evidence, consisting of a copy of the telegraph blank of defendant, certified by the Secretary of the Interstate Commerce Commission.

MR. JOHNSON: If Your Honor please, we object to this, on the ground that the contract in question in this suit is the one which is introduced in evidence and the one which is binding upon the defendant and the plaintiff, and that is the only one that should be considered in this litigation.

THE COURT: It may go in, subject to the objection:

Said Exhibit B is in words and figures following:

Interstate Commerce Commission

"Washington

"I, GEORGE B. MCGINTY, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is a true copy of form received on February 20, 1917, from the Western Union Telegraph Company and now on file with the Interstate Commerce Commission.

"In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 12th day of March, A. D., 1919.

(Signed)

"GEORGE B. MCGINTY,

"Secretary of the Interstate Commerce Commission."

WESTERN UNION

Class of Service		Form 1206
Desired	Western Union	Receiver's No.
Fast Day Message	TELEGRAM	M. B. 60
Day Letter		Check
Night Message		49 pdnl.
Night Letter	X	Time Filed

Patrons should mark an "X" opposite the class of service desired; OTHERWISE THE TELEGRAM WILL BE TRANSMITTED AS A FAST DAY MESSAGE.

NEWCOMB CARLTON, President.

GEORGE W. E. ATKINS, First Vice-President.

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to.

Boise, Idaho, November 30, 1917.

J. A. CZIZEK,

5767 Shafter Avenue

Oakland, Calif.

Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow Will you take ninety dollars per share for yours I am inclined to accept offer for mine Answer.

T. J. JONES.

(454 Yates B)

(.65c) (408-W)

All telegrams taken by this company are subject to the following terms:

To guard against mistakes or delays, the sender

of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:

1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED telegram, beyond fifty times the sum received for sending the same, *unless specially valued*; nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams*.

2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

3. The Company is hereby made the agent of

the sender, without liability, to forward this telegram over the lines of any other Company when necessary to reach its destination.

4. Telegrams will be delivered free within one-half mile of the Company's office in towns of 5,000 population or less, and within one mile of such office in other cities or towns. Beyond these limits the Company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reasonable price.

5. No responsibility attaches to this Company concerning telegrams until the same are accepted at one of its transmitting offices; and if a telegram is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission.

7. *Special terms governing the transmission of messages under the classes of messages enumerated below shall apply to messages in each of such respective classes in addition to all the foregoing terms.*

8. *No employee of the Company is authorized to vary the foregoing.*

THE WESTERN UNION TELEGRAPH COMPANY, Incorporated.

NEWCOMB CARLTON, *President.*

CLASSES OF SERVICE

FAST DAY MESSAGES

A full-rate expedited service.

NIGHT MESSAGES

Accepted up to 2:00 A. M. at reduced rates to be sent during the night and delivered not earlier than the morning of the ensuing business day.

DAY LETTERS

A deferred day service at rates lower than the standard day message rates as follows: One and one-half times the standard Night Letter rate for the transmission of 50 words or less and one-fifth of the initial rate for each additional 10 words or less.

SPECIAL TERMS APPLYING TO DAY LETTERS:

In further consideration of the reduced rate for this special "Day Letter" service, the following special terms in addition to those numerated above are hereby agreed to:

A. Day Letters may be forwarded by the Telegraph Company as a deferred service and the transmission and delivery of such Day Letters is, in all respects, subordinate to the priority of transmission and delivery of regular telegrams.

B. Day Letters shall be written in plain English. Code language is not permissible.

C. This Day Letter may be delivered by the Telegraph Company by telephoning the same to the

addressee, and such delivery shall be a complete discharge of the obligation of the Telegraph Company to deliver.

D. This Day Letter is received subject to the express understanding and agreement that the Company does not undertake that a Day Letter shall be delivered on the day of its date absolutely and at all events; but that the Company's obligation in this respect is subject to the condition that there shall remain sufficient time for the transmission and delivery of such Day Letter on the day of its date during regular office hours, subject to the priority of the transmission of regular telegrams under the conditions named above.

No employee of the Company is authorized to vary the foregoing.

NIGHT LETTERS

Accepted up to 2:00 A. M. for delivery on the morning of the ensuing business day, at rates still lower than standard night message rates, as follows: The standard day rate for 10 words shall be charged for the transmission of 50 words or less, and one-fifth of such standard day rate for 10 words shall be charged for each additional 10 words or less.

SPECIAL TERMS APPLYING TO NIGHT LETTERS:

In further consideration of the reduced rate for this special "Night Letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

A. Night Letters may at the option of the Telegraph Company be mailed at destination to the ad-

dressees, and the Company shall be deemed to have discharged its obligation in such cases with respect to delivery by mailing such Night Letters at destination, postage prepaid.

B. Night Letters shall be written in plain English. Code language is not permissible.

No employee of the Company is authorized to vary the foregoing.

Thereupon, a certain paper was marked Defendant's Exhibit No. C and offered in evidence, consisting of a certified copy, certified by the Secretary of the Interstate Commerce Commission, of certain rules of the company on file with the Commission, being rules 1, 5, 9 and 29.

MR. JOHNSON: Let the record show that plaintiff objects to it, on the ground that it is not shown that these rules and regulations were brought to the attention of the plaintiff in this suit, and the plaintiff in the suit was not a party to the contract, and did not file the telegram, and is not bound by the rules.

MR. MORROW: I assume, your honor, that the question as to the effect of those rules not having been brought to the plaintiff's attention is one of the matters that will have to be discussed on the final argument. If the Court has any doubt on the matter—

THE COURT: It may go in, subject to the objection.

The Court afterwards overruled this objection and held that provisions on the telegraph blank set up as

defenses were binding upon plaintiff, the addressee of the message, and that T. J. Jones in sending the message was acting as the agent of plaintiff, to which ruling of the Court an exception was allowed to the plaintiff by the Court. Defendant's Exhibit No. C is transmitted as an original exhibit, to the Court of Appeals, by order of the District Court.

L. C. Flora, heretofore duly sworn, upon being recalled on behalf of defendant, testified as follows:
DIRECT EXAMINATION By Mr. Morrow:

WITNESS: In the business of defendant company, we have several different classes of messages. They are the repeated, the unrepeatd and the valued messages.

Q. Now state what the method of handling the repeated and unrepeatd telegrams is, in your office.

A. An unrepeatd telegram—

MR. JOHNSON: I would like to simply interpose an objection there, and object to it as incompetent, irrelevant and immaterial, and not binding upon the plaintiff in this case. It has nothing to do with the issues raised in the pleadings in the case.

MR. MORROW: I may state very briefly, Your Honor—

THE COURT: Well, it is unnecessary. It may go in, subject to the objection. I will hear you on the whole subject later.

The Court afterwards overruled this objection, and held that the provisions of the contract with reference to repeated and valued telegrams were binding upon the plaintiff, the addressee of the mes-

sage. To which ruling of the Court an exception was allowed to plaintiff by the Court.

WITNESS: An unrepeatd telegram is accepted over the counter, counted, initialed by the clerk handling, timed by an automatic time clock, and hung on the hook provided for that purpose, to take its turn with other telegrams. While a repeated telegram is given the same handling up to the point that it is given directly to the operator for transmission, and not hung on a hook with the average class of unrepeatd messages. A valued telegram is handled likewise. A repeated or valued message is retained with other telegrams and filed away as other telegrams are filed. The handling of it, seeing that handled and repeating back of it, is the only material difference in the handling given. It is first, as I have just said, turned over to the operator for transmission. It is transmitted to the distant point or other relay point, and then repeated back for accuracy to the sending or originating office. The notation made on the face of a repeated telegram is "Repeated back, O.K.", by the operator's initials who has handled the message. That is after it has been sent. Prior to sending, the words "Repeat back", are placed on the face of the telegram. To see whether it has been repeated or not, the sending marks are observed, and the initials by the clerk handling that, to insure that it has been transmitted and properly repeated back.

CROSS EXAMINATION By Mr. Johnson:

WITNESS: The first thing done with an unre-

peated message is, it is first counted, initialed by the clerk, that is, his or her initials put on the face of the telegram to identify who has handled it. That is usually placed in the upper right hand corner. The difference between the handling of an unrepeated message and a repeated message, it is counted first, and the two words, "Repeat back", are written immediately after the check. You will note there in the column check. And the two words "Repeat back" follow that naturally. The first thing that is done with either telegram, is to count them. That is the case with both the repeated and the unrepeated. Then the clerk initials and times it. That is the case with both of them up to that point.

Defendant's Exhibit No. A was handed to the witness.

WITNESS: It has an initial there. You will note the initials "M. B.", perhaps, or "M. Z.", whatever they are, anyway. That would indicate the clerk's initials who handled the message. Yes, that it was received by the clerk and initialed by her. The other writing is forty-nine, paid, N. L., which indicates night letter, as is indicated on the left hand corner.

(Witness excused.)

Defendant rests.

At the conclusion of the testimony, the Court made an order that counsel on both sides submit to the Court and serve on opposing counsel, written briefs covering the point at issue, and this was accordingly done. Counsel for plaintiff in his brief con-

tended that, under the testimony showing that the telegraph message had never been transmitted from the Boise office at all, and no excuse or explanation of such failure having been made by defendant, and the further fact that the sender had been informed by defendant a few days after the message was filed in the Boise office, that it had been sent and delivered to plaintiff, such facts constituted gross negligence on the part of defendant, from which it was not relieved from liability by any of the conditions of the telegraph blank which are pleaded as special defenses in the answer.

The Court, as appears from its written opinion, declined to so find and decide, but held that these facts did not constitute gross negligence but came within the protection of the limitation of liability clauses of the contract. To which ruling plaintiff was allowed an exception by the Court.

The Court also in his said written opinion made certain finding upon certain of the issues, as follows:

(Title of Court and Cause.)

“This suit is brought to recover damages for the failure of the defendant to send the following telegram:

“ ‘November 30, 1917.

“ ‘J. A. Czizek,

“ ‘5767 Shafter Avenue,

“ ‘Oakland, Calif.

“ ‘Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says

if fails to get two thirds stock liquidation will follow Will you take ninety dollars per share for yours I am inclined to accept offer for mine. Answer.

“ ‘T. J. JONES.’

“It is admitted, or the evidence conclusively shows, that the message, written upon a regular blank form, was filed for transmission in the defendant’s office at Boise, Idaho, on November 30th, 1917, the charges being prepaid upon the basis of the established tariffs for ordinary messages; that it was never delivered to the plaintiff and indeed was not transmitted at all; that on February 14th, 1918, for the first time, the plaintiff learned that the message had been filed, and the sender that it had not been delivered; and upon that date together they made inquiry at the defendant’s Boise office, whereupon, after investigation, the manager of the office addressed a letter to the sender, dated February 14th, acknowledging the failure to transmit and tendering a return of the charges paid; that there was no written or formal demand for damages by plaintiff until June 18th, 1918, at which time he presented a claim in writing for \$4500.00, on the theory that the fifty shares of bank stock owned by him were, and ever since the middle of February, 1918, had been worth that sum, whereas if the telegram had been promptly delivered he could and would have sold the same for \$90.00 per share. In response to this demand promise was made to investigate, but without waiving the defense that the claim was barred by reason of the

plaintiff's failure to make demand within the period specified on the telegraph blank."

Plaintiff in his written brief also contended that defendant expressly waived this defense of the 60 day limitation by the actions and correspondence of its officers and agents; and to this ruling that the promise to investigate was made without waiving the defense that the claim was barred by reason of plaintiff's failure to file a formal claim within the 60-day period specified on the blank, plaintiff is hereby allowed an exception on the ground that the finding is not supported by the evidence and is against law.

The Court in his opinion further stated:

"While the point is controverted, I think it also clear that in filing the message the sender was acting for the plaintiff as his agent."

Plaintiff in his written brief also contended that this was an action in tort and not based upon any contract made by the addressee with the company, and that the sender was not acting as plaintiff's agent; and to this ruling that the sender was acting for the plaintiff as his agent, plaintiff is allowed an exception on the ground that it is not supported by the evidence.

The Court in his opinion further found:

"I further find that Miller desired and was able to buy the stock at \$90.00 per share, and that the telegram is to be construed as advising plaintiff of an offer of \$90, and, had it been delivered, such is the meaning it would have conveyed to him.

“That the form of the telegraph blank here involved, with the indorsements thereon, had been regularly filed with the Interstate Commerce Commission and had been published as required by law.

“That the parties concerned were wholly ignorant of defendant’s failure to send or deliver the message until after the expiration of 60 days from the filing of the message.

“That plaintiff had full knowledge on February 14, 1918, but did not make demand until June 18, a period of a little more than four months.

“That the evidence is insufficient to support a finding that plaintiff suffered any damages as a result of his failure to receive the telegram and that he would have embraced the opportunity of which the telegram was intended to advise him, and that he could have or would have delivered the stock which was held in a San Francisco bank as collateral, while Miller was willing and able to keep his offer good.”

The plaintiff in his brief contended that the evidence is sufficient to support a finding that plaintiff was damaged as a result of his failure to receive the telegram, and that he would have embraced the opportunity to sell his stock and could have delivered the stock while Miller was willing and able to keep his offer good, and that there is no evidence to the contrary in the record; and the plaintiff is hereby allowed an exception to the contrary finding by the Court, on the ground that such finding of the Court is not supported by the evidence.

The Court also made a general finding in the judgment in favor of defendant and against plaintiff, to which an exception is hereby allowed to plaintiff by the Court, on the ground that the evidence is insufficient to support such finding.

The Court also held as a conclusion of law from the foregoing findings and testimony in the case, that plaintiff was not entitled to recover and he take nothing by the complaint, and that defendant have judgment for its costs of suit; to which ruling of the Court counsel for plaintiff is hereby allowed an exception.

The foregoing constitutes all of the testimony and statement of all of the evidence introduced and offered upon the trial of this cause.

The Court on the 8th day of May, 1920, filed and entered its judgment herein in favor of the defendant and against the plaintiff.

Rule 75 of the rules of this Court provides:

That within thirty days after the entry of judgment the applicant for a new trial shall serve upon the adverse party and file with the clerk a petition for new trial, stating the papers upon which the application is to be made.

Within the time specified in this rule, to-wit on June 5, 1920, counsel for plaintiff duly served and filed his petition for a new trial herein, which is as follows:

(Title of Court and Cause.)

PETITION FOR NEW TRIAL

To the above named defendant, Western Union

Telegraph Company, and Messrs. Richards & Haga, its attorneys herein, and to the Clerk of the above entitled Court:

You and each of you will please take notice that the above-named plaintiff will petition the above-entitled Court to set aside the judgment and grant a new trial in the above-entitled cause; said petition will be heard before the above-entitled Court or the Judge thereof at the Court Room of said Court in the Federal building at Boise, Idaho, on the 12th day of June, 1920, at ten o'clock A. M., or as soon thereafter as counsel can be heard, and will be based upon the following grounds, to-wit:

FIRST

Insufficiency of the evidence to justify the decision and judgment in the following particulars, to-wit:

(a) That the evidence is insufficient to prove or establish that defendant and its officers and agents did not waive the defense that plaintiff's claim was barred by reason of plaintiff's failure to make demand within the period specified on the telegraph blank.

(b) The evidence is insufficient to prove or establish that in filing the message the sender, T. J. Jones, was acting for the plaintiff as his agent.

(c) The evidence is insufficient to prove or establish that there was nothing unusual on the face of the message to impress defendant's employees that it was of special importance.

(d) The evidence is insufficient to prove or establish that plaintiff did not suffer any damage as a

result of the failure of defendant to transmit the telegram.

(e) The evidence is insufficient to prove or establish that plaintiff would not or might not have accepted the offer contained in the telegram for his bank stock, but on the contrary shows conclusively that he would have accepted such offer.

(f) The evidence is insufficient to prove or establish that plaintiff could not or would not have delivered his bank stock to Miller, by reason of its being held in a bank in San Francisco as collateral, but, on the contrary, the evidence conclusively shows that plaintiff's bank stock was available to him to sell at the time the offer was made and that plaintiff could have obtained it from the bank for that purpose.

(g) The evidence is insufficient to prove or establish that plaintiff was necessarily ignorant of the precise situation and would or might have sought to negotiate for a higher price for his stock, but on the contrary the evidence conclusively shows that he was wholly familiar with the situation and would have at once accepted the offer contained in the message of \$90.00 per share.

SECOND

That the said decision and judgment is against law for the following reasons:

(a) That the Court was without jurisdiction to try said cause by reason of the fact that said action could not have been originally brought in said Court, and neither plaintiff nor defendant, at the time said action was commenced, were citizens or residents of

the District of Idaho.

(b) That the findings of fact by the Court, upon which the decision and judgment was based, do not determine all the material issues raised by the pleadings upon which evidence was introduced at the trial.

(c) That it was an error of law for the Court to decide that the actions and letters of the local manager of defendant, Mr. Hackett, and of the district superintendent, Mr. Life, did not constitute a waiver of the defense that plaintiff's claim was barred by the clause requiring the written claim to be presented within 60 days after the telegram is filed with the company for transmission.

(d) That it was an error of law for the Court to decide that this limitation clause was binding upon plaintiff, the addressee of the message.

(e) That it was an error of law for the Court to hold that the period of limitation began to run when plaintiff learned of the failure to transmit the message.

(f) That it was an error of law for the Court to hold that the "specially valued" clause applied where no attempt was made to transmit the message.

(g) That it was an error of law for the Court to hold that the acts of defendant's agents in wholly failing to transmit the message, and in informing the sender that it had been sent and delivered to plaintiff at Oakland, did not constitute gross negligence.

(h) That it was an error of law for the Court

to hold and decide that judgment should be made and entered in favor of defendant.

That said petition will be heard upon the pleading and papers on file and upon "the minutes of the Court," and also the reporter's transcript of his shorthand notes of the trial.

(Signed) RICHARD H. JOHNSON,
Attorney for Plaintiff.

This petition came on regularly for hearing on the 17th day of June, 1920, and was argued by counsel for both sides, and after argument, was on that day overruled by the Court. And thereupon, for the first time, counsel for plaintiff moved the Court for an extension of time of 20 days, or until July 8, 1920, within which to serve and file plaintiff's proposed bill of exceptions, which motion was argued by counsel for both sides. The Court considered the fact of the pendency of the motion for new trial, and the Court allowed plaintiff's motion for an extension of time of 20 days within which to file and serve his proposed bill of exceptions, which order denying a new trial and granting plaintiff's motion for an extension of time is as follows:

(Title of Court and Cause.)

ORDER

This cause coming regularly on for hearing this 17th day of June, 1920, being a day of the regular term at which said cause was tried, upon plaintiff's motion for an extension of time to file his bill of exceptions herein, and also upon plaintiff's motion for a new trial, Richard H. Johnson, Esq., appearing

as attorney for plaintiff and Messrs. Richards & Haga appearing as attorneys for defendant, and the Court having heard the arguments of counsel and being fully advised on the premises does hereby order and adjudge:

1. That plaintiff's motion for a new trial be and the same is hereby overruled.

2. That plaintiff's time for filing and serving his proposed bill of exceptions to the rulings, findings and decision of the Court at the trial be and the same is hereby extended to and until the eighth day of July, 1920.

(Signed)

FRANK S. DIETRICH,

District Judge.

Done in open Court this 17th day of June, 1920.

Plaintiff's proposed bill of exceptions was duly filed and served within the time allowed by this order, to-wit, on July 2, 1920, and thereafter, on July 12, 1920, counsel for defendant served and filed a motion to strike, which is as follows:

(Title of Court and Cause.)

MOTION TO STRIKE

COMES NOW, The above named defendant, and moves the Court to strike from the files herein the proposed bill of exceptions of plaintiff filed herein on the following grounds:

(1) That such bill was not filed or served on counsel for defendant herein within the time required by law or the rules of this Court.

(2) That this Court had no power or jurisdiction to extend the time for filing such bill after the

time required by law and the rules of this Court for filing such bill had expired.

And this defendant also moves the Court to strike from such proposed bill of exceptions all that portion thereof from and after the word "complaint" in line 7 from the top of page 1 of such bill, after the caption, to and including the words "the Court" in line 17 from the top of page 9 of such bill, on the following grounds:

(1) That such portion of such bill was not filed or served on counsel for defendant within the time required by law or the rules of this Court for filing such bill, or any bill embracing the exceptions therein set forth.

(2) That this Court had no power or jurisdiction to extend the time for filing such proposed bill after the time required by law and the rules of this Court for filing a bill of exceptions to the ruling therein mentioned had expired.

And this defendant also moves the Court to strike from such proposed bill of exceptions all that portion of such bill included between line 15 from the bottom of page 9 of such bill and the bottom of page 47 of such bill, on the following grounds:

(1) That such portion of such bill was not filed or served on counsel for defendant within the time required by law and the rules of this Court for filing such portion of such bill.

(2) That this Court had no power or jurisdiction to extend the time for filing such bill after the

time required by law and the rules of this Court for filing such bill had expired.

(3) That the record herein fails to show that any special findings or any request for special findings were made or that any findings herein, other than a general finding, were made, and in such cases the said plaintiff is not permitted under the law to present the question of the insufficiency of the evidence to support the judgment rendered herein.

And the defendant also moves the Court to strike from such proposed bill of exceptions that portion thereof beginning with page 48 to and including the fifth line from the top of page 51 of such bill on the following grounds:

(1) That no request was made by either party to this cause for special findings or any findings and no special findings were made by the Court, and the statements in the proposed bill of exceptions to the effect that counsel for plaintiff requested the Court to find certain facts are not supported by the record.

(2) That such portion of such bill was not filed or served on counsel for defendant within the time required by law and the rules of this Court.

(3) That the Court had no power or jurisdiction to extend the time for filing such proposed bill of exceptions after the time required by law and the rules of this Court had expired.

(4) That the opinion of this Court herein cannot be regarded or considered as a special finding within the meaning of the Federal Statutes, or the rules of practice of this Court.

(5) That the record herein fails to show any special findings were requested or made prior to final judgment herein and the opinion or decision of this Court herein cannot be referred to or regarded as a special finding or as embracing a special finding.

(Signed)

RICHARDS & HAGA,
Attorneys for Defendant.

Residence: Boise, Idaho.

This motion came on for hearing on July 14, 1920, and was argued by counsel.

Thereafter, on July 15, 1920, the Court sustained said motion to the extent of striking the portion of the bill of exceptions relating to the motion to remand, on the ground that a bill of exceptions was not prepared and served within the ten days allowed by the rules after the order denying the motion was made, or during the term of Court at which the order denying the motion to remand was made; to which ruling counsel for plaintiff excepted, which exception is allowed by the Court. The affidavits and papers relating to the motion to remand as set forth in the foregoing bill of exceptions, were all of the affidavits and evidence before the Court on said motion to remand.

Rules 76 of this Court relating to bills of exceptions reads as follows:

“A bill of exceptions to any ruling may be reduced to writing and settled and signed by the Judge at any time the ruling is made, or at any subsequent time during the trial, if the ruling was made during a trial, or within such

time as the Court or Judge may allow by order made at the time of the ruling, or if the ruling was during a trial by order made at any time during the trial, or within the time hereinafter mentioned, and when so signed shall be filed with the clerk.

“If not settled and signed as above provided, a bill of exceptions may be settled and signed as follows: The party desiring the bill shall within ten days after the ruling was made, or if such ruling was made during a trial within ten days after the rendition of the verdict, or, if the case was tried without a jury within ten days after written notice of the rendition of the decision, serve upon the adverse party a draft of the proposed bill of exceptions. The exception must be accompanied with a concise statement of so much of the evidence or other matter as is necessary to explain the exception and its relation to the case, and to show that the ruling tended to prejudice the rights of such party. Within ten days after such service the adverse party may serve upon the proposing party proposed amendments to the proposed bill. Such proposed bill and the proposed amendments shall within five days thereafter be delivered by the proposing party to the Clerk for the Judge. The Clerk must, as soon as practicable thereafter, deliver said proposed bill and amendments to the Judge, who must thereupon designate a time at which he will settle the bill; and

the Clerk must, as soon as practicable thereafter notify or inform both parties of the time so designated by the Judge. In settling the bill the Judge must see that it conforms to the truth, and that it is in proper form, notwithstanding that it may have been agreed to by the parties, or that no amendments may have been proposed to it, and must strike out of it all irrelevant, unnecessary, redundant and scandalous matter. After the bill is settled, it must be engrossed by the party who proposed the bill, and the Judge must thereupon attach his certificate that the bill is a true bill of exceptions; and said bill must thereupon be filed with the Clerk."

The Court, at the hearing for the settlement of this bill of exceptions, also suggested certain amendments, which were accepted by counsel for both sides and are duly incorporated in this bill of exceptions.

The Court overuled the remaining grounds of defendant's motion to strike, to which ruling defendant is allowed an exception.

NOW THEREFORE, It appearing to the Court that the foregoing bill of exceptions has been amended as directed by the Court and that the same is true and correct, it is hereby approved, allowed and settled and made a part of the record herein, this 16th day of July, 1920, a day of the regular term at which said cause was tried.

(Signed) FRANK S. DIETRICH,

Lodged July 2, 1920.

Judge.

Endorsed: Filed July 16, 1920.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

PETITION FOR WRIT OF ERROR

And now comes J. A. Czizek the plaintiff herein by Richard H. Johnson, his attorney, and feeling himself aggrieved by the final judgment of this Court entered against him and in favor of said defendant, on the 8th day of May, 1920, hereby prays that a writ of error may be allowed to him from the United States Circuit Court of Appeals of the Ninth Circuit, to the District Court of the United States for the District of Idaho, Southern Division, and in connection with this petition, petitioner herewith presents his assignment of errors and prays that a transcript of the records, proceedings and papers on which said judgment was made and entered, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated Boise, Idaho, July, 29, 1920.

RICHARD H. JOHNSON,

Attorney for Plaintiff.

The writ of error as prayed for in the foregoing petition is hereby granted and allowed upon the plaintiff's giving bond according to law in the sum of \$200.00, and upon the filing of such bond, it is ordered that a transcript of the records, proceedings, evidence, affidavits, orders and papers, upon which the judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, that such other and

further proceedings may be had as may seem proper in the premises.

Dated July 29, 1920.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed July 29, 1920.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS

And now comes the plaintiff in error, J. A. Czizek, by Richard H. Johnson, his attorney, and in connection with his petition for writ of error says, that in the record, proceedings and in the final judgment aforesaid, manifest error has intervened to the prejudice to the plaintiff in error, to-wit:

1. The Court erred in denying the motion of the plaintiff in error to remand said cause to the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada and in entering its order dated the 10th day of October, 1919, denying said motion to remand and in denying the application of plaintiff in error to make a further showing as to his residence and citizenship at the time said action was commenced and since that time.

2. The Court erred in sustaining defendant's objection to the testimony of plaintiff that if he had received the telegram he would have accepted the offer contained in the message.

3. The Court erred in holding that the testimony relating to the statements and communications of

Mr. Hackett, manager, to T. J. Jones and to plaintiff, and the letter from Mr. Life, district superintendent, did not constitute a waiver by defendant of the clause on the telegraph blank which provides for the filing of a claim in writing within 60 days after the telegram is filed with the company for transmission.

4. The Court erred in holding that the evidence was insufficient to show that plaintiff could have gotten his stock which was held in a bank at Oakland as collateral, to Boise in time to have accepted the offer made by Miller, even if the telegram had been sent and delivered.

5. The Court erred in overruling plaintiff's objection to the admissibility of the rules and regulations contained on the telegraph blank and filed with the Interstate Commerce Commission on the ground that these rules and regulations were not binding upon plaintiff, the addressee of the message.

6. The Court erred in overruling plaintiff's objection that the provisions on the telegraph blank relating to repeated and valued telegrams were not binding upon plaintiff, the addressee of the message.

7. The Court erred in holding and deciding, under the testimony showing that the telegraphic message had never been transmitted from the Boise office at all, and no excuse or explanation of such failure having been made at all by defendant, and the further fact that a few days after the message was filed for transmission in the Boise office, the defendant informed the sender that the message had

been sent and delivered to plaintiff in Oakland, that these facts did not constitute gross negligence, which would except the case from the conditions on the telegraph blank limiting the defendant's liability.

8. The Court erred in holding and deciding that there was nothing unusual on the face of the telegram to impress the defendant and its servants and employees with the fact that it was of special importance.

9. The Court erred in holding that in sending the message the sender was acting as agent of the plaintiff.

10. The Court erred in holding that the evidence was insufficient to support a finding that plaintiff was damaged by the defendant's failure to transmit and deliver the telegram, and that plaintiff would have embraced the opportunity to sell his stock and could and would have delivered it while Miller was able and willing to make his offer good.

11. The Court erred in finding in favor of defendant and entering judgment in favor of defendant and against plaintiff.

12. The Court erred in not entering judgment in favor of plaintiff against defendant for the amount prayed for in plaintiff's complaint.

13. The Court erred in sustaining defendant's motion to strike from the bill of exceptions that portion thereof relating to the motion to remand the case to the State Court.

BY REASON WHEREOF, plaintiff in error prays that the judgment may be reversed.

RICHARD H. JOHNSON,
Attorney for Plaintiff in Error.

Endorsed: Filed July 29, 1920.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 692

BOND

KNOW ALL MEN BY THESE PRESENTS That we, J. A. Czizek, plaintiff in error, as principal, and G. R. Hitt and J. H. Black of Boise, Ada County, Idaho, as sureties, are held and firmly bound unto the above named Western Union Telegraph Company, defendant in error, in the sum of Two Hundred Dollars (\$200.00) to be paid to it, for the payment of which, well and truly to be made, we bind ourselves and each of us, and our and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our hands and dated this 29th day of July, 1920.

WHEREAS the above named plaintiff in error has prosecuted his writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the order and judgment of the District Court of the United States for the District of Idaho, Southern Division, made and entered on the 8th day of May, 1920;

NOW THEREFORE, the condition of this obliga-

tion is such that if the above named plaintiff in error shall prosecute said writ of error to effect and answer all damages and costs, if he fails to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Signed) J. A. CZIZEK. (SEAL)

By Richard H. Johnson, his attorney and agent.

(Signed) G. R. HITT. (SEAL)

(Signed) J. H. BLACK. (SEAL)

State of Idaho,

County of Ada,—ss.

G. R. Hitt and J. H. Black, being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Idaho and residents and freeholders in the said County of Ada, and know the contents of the foregoing instrument to which we have attached our names. We, each for himself, say we are worth the sum of Two Hundred Dollars (\$200.00) over and above all debts, liabilities and exemptions.

(Signed) G. R. HITT.

(Signed) J. H. BLACK.

Subscribed and sworn to before me this 29th day of July, 1920.

(Signed) H. L. STREETER,

(Seal) Notary Public, Residence, Boise, Idaho.

Bond Approved.

FRANK S. DIETRICH, *Judge.*

Endorsed: Filed July 29, 1920.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

WRIT OF ERROR

United States of America,—ss.

The President of the United States of America to the Judges of the District Court of the United States of the Ninth Judicial Circuit in and for the District of Idaho, Southern Division, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said District Court, before you between J. A. Czizek, plaintiff, and Western Union Telegraph Company, defendant, a manifest error hath happened to the great damage of the said plaintiff J. A. Czizek, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco in the State of California on the 27th day of August next, in the said United States Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Edward D. White, Chief

Justice of the United States, this 29th day of July, in the year of our Lord one thousand nine hundred and twenty, and of the independence of the United States the one hundred and forty-fifth.

(Seal) W. D. McREYNOLDS,
*Clerk of the District Court of the Ninth Judicial
Circuit, in and for the District of Idaho, Southern
Division.*

The above writ of error is hereby allowed.

FRANK S. DIETRICH,
Judge.

I hereby certify that a copy of the within writ of error was, on the 29th day of July, 1920, lodged in the Clerk's office of the said United States District Court for the District of Idaho, Southern Division, for the said defendant in error.

W. D. McREYNOLDS,
*Clerk of the United States District Court, District of
Idaho, Southern Division.*

Endorsed: Filed July 29, 1920.

W. D. McReynolds, Clerk.

CITATION

(Title of Court and Cause.)

United States of America,—ss.

To Western Union Telegraph Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco in the State of California on the 27th day of August, A. D. 1920, pursuant to writ of error on file

in the Clerk's office of the District Court of the United States of the Ninth Judicial Circuit, in and for the Southern Division of the District of Idaho, in that certain action No. 692 wherein J. A. Czizek is plaintiff in error and you, said Western Union Telegraph Company are defendant in error, to show cause, if any there be, why the judgment given, made and rendered against the said J. A. Czizek in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Frank S. Dietrich, United States District Judge for the Southern Division of the District of Idaho, Ninth Judicial Circuit, this 29th day of July, 1920, and of the Independence of the United States, the 145th.

FRANK S. DIETRICH,
United States District Judge for the District of Idaho.

Service of the foregoing citation is hereby acknowledged this 29th day of July, 1920.

Endorsed: Filed July 29, 1920.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 692

PRAECIPE

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled cause for the use of the United States

Circuit Court of Appeals for the Ninth Circuit, by including therein the following:

1. Complaint.
2. Answer.
3. Decision of Court.
4. Judgment and notice of entry of judgment.
5. Bill of exceptions.
6. Petition for writ of error and order allowing writ.
7. Assignment of errors.
8. Bond in writ of error.
9. Writ of error.
10. Citation.
11. Praecept.
12. Return of Record.
13. Clerk's certificate.

Dated July 29th, 1920.

RICHARD H. JOHNSON,
Attorney for Plaintiff in Error.

Service of above praecipe acknowledged this 29th day of July, 1920.

RICHARDS & HAGA.

Endorsed: Filed July 29, 1920.

W. D. McReynolds, Clerk.

RETURN TO WRIT OF ERROR

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United

States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

W. D McREYNOLDS,

(Seal)

Clerk.

(Title of Court and Cause.)

No. 692

CLERK'S CERTIFICATE

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 133 inclusive, to be full true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same, together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$154.85, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said Court, this 21st day of August 1920.

W. D McREYNOLDS,

(Seal)

Clerk.

IN THE 2

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth District

J. A. CZIZEK, *Plaintiff in Error*,

vs.

WESTERN UNION TELEGRAPH COMPANY,
a Corporation, *Defendant in Error*.

BRIEF OF PLAINTIFF IN ERROR

RICHARD H. JOHNSON,
Attorney for Plaintiff in Error.

Residence, Boise, Idaho.

Upon Writ of Error to the United States District
Court for the District of Idaho, Southern Division

FILED
1911

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IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
For the Ninth District

J. A. CZIZEK, *Plaintiff in Error*,

vs.

WESTERN UNION TELEGRAPH COMPANY,
a Corporation, *Defendant in Error*.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF FACTS.

This is an action in tort brought originally in the District Court of Ada County, Idaho, by plaintiff, the addressee of a telegram, against the defendant telegraph company to recover the actual damages sustained by reason of the alleged gross negligence of the defendant in wholly failing to transmit or to attempt to transmit a prepaid, unrepeatd business message, which message was from T. J. Jones, at Boise, to plaintiff, at Oakland, containing an offer to purchase plaintiff's 50 shares of bank stock at \$90 per share, delivered to and accepted by defendant at Boise. A jury was waived by stipulation, and the

case tried by the Court. For brevity, the parties will be referred to as plaintiff and defendant. There is no controversy over the facts, as the evidence submitted to support the allegations of the complaint is not controverted by defendant, and it introduced no evidence to dispute these facts but relied upon certain special defenses based upon the printed conditions on the telegraph blank.

The facts established at the trial show, that on and prior to the delivery of the message in question to defendant on November 30, 1917, plaintiff was the owner of 50 shares of stock, of the face value of \$5000, in the Idaho National Bank, located at Boise, Idaho; and T. J. Jones, an attorney at Boise, was the owner of 15 shares of this stock. Previous to that time one David Miller, a large stockholder and the vice-president of the bank, had informed plaintiff, at Boise, of his desire to purchase plaintiff's stock and to effect a merger of the Idaho National with the Pacific National Bank, at Boise. (Tr. p. 72.) Plaintiff informed Miller that he did not wish to be a party to the merger but wished to sell his stock. They discussed the value of it pro and con for a little while and did not arrive at anything, because plaintiff learned that Miller was not ready just then to buy it, but he told plaintiff he was going away and would be back at a certain time or near a certain time, when he would be ready to negotiate further with plaintiff, and that they would have no trouble about agreeing on the price and that he, Miller,

would buy plaintiff's stock. Plaintiff then went to T. J. Jones and informed him what Miller had said, and that Miller would be back to Boise with the money to buy their stock, and what he had said regarding the merger, and that plaintiff wanted Jones to negotiate with Miller for him, and that they, plaintiff and Jones, would sell together, that Miller wished to buy both their holdings together. Within a day or two after this talk with Miller, plaintiff went to his home at 5767 Shafter Avenue, Oakland, California, and was there continuously between November 30, 1917, and shortly after the first of February, 1918, excepting little drives out into the country. He never received any telegram from Mr. T. J. Jones and received nothing with reference to his bank stock. (Tr. pp. 56, 72-73.)

Mr. Miller returned to Boise from the East early in November, 1917. On November 30, 1917, he had a balance in the Idaho National Bank at the close of business, of \$84,003.57, and his balance to and including December 4, 1917, was never less than \$30,000; and he had already purchased large amounts of stock in that bank. (Tr. p. 92.)

On November 30, 1917, Miller had a talk with Mr. T. J. Jones with reference to purchasing plaintiff's 50 shares and Jones' 15 shares, and offered \$90.00 per share. The final negotiations took place in the evening of that day at the bank. Mr. Miller, Mr. Jones and Miss Nellie Wilson, bookkeeper and stenographer for the bank, were present. Mr. Jones

informed Miller that there was no use discussing the purchase of the stock unless he had the money to pay for it, a cash transaction. Miller referred Jones to the bank books and to Miss Wilson. Jones asked Miss Wilson, and she informed Jones that Miller had the money to buy plaintiff's and Jones' stock. She said: "Sell. He has got money enough here to take care of any check that he will issue for you." (Tr. pp. 58-59.)

Jones then drafted in pencil a telegram to plaintiff, and had it typed in triplicate by Miss Wilson and submitted it to Miller. Miller wrote the word "Answer" at the end with a pen. (Tr. p. 59, and testimony of Miss Wilson, p. 95.)

The telegram, which was an unrepeated message, was as follows:

"November 30, 1917.

"J. A. CZIZEK,
5767 Shafter Avenue,
Oakland, Calif.

"Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait (here) year and chances of liquidation says if fails to get two-thirds stock liquidation will follow will you take ninety dollars per share for yours I am inclined to accept offer for mine. Answer.

T. J. JONES."

Mr. Jones gave one copy to Miller, one copy to his son and law partner, Felix Jones, and put the other in his safe. At his direction, his son Felix took the telegram to the defendant's office in Boise and de-

livered it to the operator there, and prepaid the charges, and directed the operator, who stamped it, to send it to plaintiff at Oakland. (Tr. p. 85.) The following day Mr. Felix Jones, at the request of his father, went to the telegraph office and inquired if there was a message there for Jones. He was informed that there was none. He then asked the operator to look through and see if a telegram had been sent to J. A. Czizek at Oakland. The operator looked through some papers and files, and said the telegram had been sent. On the day following, or the subsequent day, Mr. Felix Jones again went to the telegraph office and inquired if the telegram had been sent to Czizek, at which they looked through some more files and replied that J. A. Czizek had received the telegram, whereupon Mr. Jones left the telegraph office. (Tr. pp. 85-88.)

The message wholly failed in transmission and was consequently never received by plaintiff, who at that time was at his home at No. 5767 Shafter Avenue, Oakland, and who testified that if he had received the telegram he would have sold his stock; that he was seeking to sell it, and that he would have accepted the offer and would have wired a reply of acceptance. (Tr. pp. 73-75.) Mr. T. J. Jones, not hearing from plaintiff and believing that he had received the telegram and was either on his way to Boise or did not wish to sell, sold his 15 shares of stock to Miller at \$90.00 per share and received the full cash price therefor of \$1350. (Tr. p. 64.)

The plaintiff did not learn of the message or the offer to buy his stock until his return to Boise, about the middle of February, 1918, or about 75 days thereafter. Meanwhile the Idaho National Bank had gone into liquidation and plaintiff's stock had become valueless, and has ever since remained so. (Tr. p. 93.) When plaintiff returned to Boise, he and Mr. T. J. Jones called upon Mr. Hackett, defendant's manager of its Boise office. (Tr. pp. 64-65.) Mr. Hackett promised to investigate and under date of February 14, 1918, sent a letter to Mr. T. J. Jones acknowledging that the message had failed in transmission and enclosing a check for the amount paid as tolls. This letter is found on page 66 of the transcript. Mr. Jones returned the check by letter, dated February 18, 1918, refusing to accept it on the ground that such acceptance might be construed as a settlement of the matter. This letter is found on page 67 of the transcript.

Mr. Hackett then took up with Mr. Jones the matter of settlement of the damages incurred by plaintiff by reason of the failure to send the message, and said among other things: "It is unfortunate that it didn't go through, and the company will settle it. There is no question about their liability." That "the amount that Czizek would be entitled to would be the difference between the value of the stock and the amount Miller offered. Isn't that correct?" (Tr. 67-70.) After further negotiations which are set forth in the transcript, Mr. Hackett requested Mr. Jones

to fix the value of the stock, as he thought Mr. Jones would be fair, and stated that he, Hackett, had taken the matter up with the company. (Tr. p. 70.)

Afterwards plaintiff received a communication from the defendant, either an agent or attorney of defendant or somebody from Salt Lake. At the suggestion of Mr. Hackett, plaintiff drafted a formal claim against the defendant for \$4,500 damages, and gave it to Mr. Hackett, who acknowledged its receipt by letter (Tr. p. 82), in which he again inquired about the value of the stock. Mr. Hackett forwarded the claim to the district commercial superintendent of defendant at Salt Lake. This claim was dated June 18, 1918, and is found in full on pages 78-79 of the transcript.

Mr. Life, the district superintendent, acknowledged receipt of the claim under date of July 2, 1918, advising that the matter had been taken under immediate investigation, upon conclusion of which plaintiff would be communicated with further. He also informed plaintiff that, more than 60 days having elapsed since the message was filed, the investigation would be conducted without prejudice to the saturation created by plaintiff's failure to bring the matter to their attention at an earlier date. This letter is found on page 81 of the transcript.

Plaintiff waited a reasonable length of time, and having heard nothing further in relation to the matter, commenced this action in a State Court at Boise, on the 13th day of June, 1919.

The case was removed by defendant to the United States District Court, on the alleged ground of diverse citizenship, it being claimed that plaintiff at the time the action was commenced was a citizen and resident of Idaho, while it is conceded that defendant corporation is a citizen of New York.

Plaintiff in due time, appearing specially for that purpose, filed a motion to remand to the State Court on the ground that at the time the action was commenced, and ever since, plaintiff was a citizen and resident of California, and that consequently the Federal Court had no jurisdiction, since the district of Idaho was neither the residence of the plaintiff or defendant and the action could not have originally been brought in the Federal Court in Idaho. The issue of plaintiff's residence was tried wholly upon affidavits, all of which are in the record, as certified to by the Court below. (Tr. p. 54.)

The motion to remand was denied by an order dated October 10, 1919. After the conclusion of the arguments, plaintiff's attorney asked leave to make a further showing as to the residence and citizenship of plaintiff at the time the action was commenced, which was denied by the Court, to all of which an exception was allowed. (Tr. pp. 54-55.)

Defendant thereafter filed an answer denying upon information and belief some of the allegations of the complaint and admitting others. Among those admitted are the presentation of the message on November 30, 1917, by T. J. Jones to defendant, and

the receipt and acceptance thereof by defendant and the payment by Jones of the regular toll or charges therefor. (Tr. pp. 15-16.) The answer also admits that about the middle of February, 1918, plaintiff and T. J. Jones called at defendant's office in Boise, and were informed that the message had never been sent to plaintiff, and it also admits the sending by defendant to T. J. Jones of the letter above referred to, dated February 14, 1918, acknowledging that the message failed in transmission. (Tr. pp. 18-19.)

The answer sets forth no allegations showing any reason why the telegram was not sent, and offers no excuse or explanation whatever for such failure.

The answer contains special defenses based upon three of the printed conditions on the back of the telegraph blank, relating to repeated and specially valued messages, and filing of written claim within 60 days, which will be hereafter discussed in detail.

The only evidence offered on behalf of defendant was a duplicate copy of the message in question, being the one filed for transmission and identical with the one above set forth, except that it contained the original pencil notations made by the receiving operator, "M B" and "49 pd. nl", in the upper right hand corner, and "454 Yates B." and "65c, 408-W" in the lower right hand corner, which are the office building number and telephone number of the sender, T. J. Jones, and the charges paid. It also shows the printed conditions relied upon as defenses, together with a certificate of the secretary of the

Interstate Commerce Commission that the attached is a true copy of form of telegraph blank filed by the defendant with the commission on February 20, 1917. (Tr. pp. 97-104.) A certified copy of the rules of the company on file with the commission was also introduced as Exhibit C.

The defendant also called Mr. Flora, present manager of the defendant at Boise, to testify as to the different methods of handling repeated and unrepeated messages. (Tr. pp. 106-107.) The witness testified that the only difference in the handling of unrepeated messages and repeated and valued messages is that the former is accepted over the counter, counted, initialed by the clerk handling, timed by an automatic clock and hung on the hook provided for that purpose, to take its turn with other telegrams, while the repeated and valued telegrams are given the same handling up to the point that they are given directly to the operator for transmission and not hung on the hook with the average class of unrepeated messages. The repeated telegram is repeated back for accuracy. On cross-examination he testified that the difference in handling the two classes of messages, is that the repeated message has the two words "repeat back", written immediately after the check. The first thing done with either is to count them, then they are both initialed and timed and both classes are handled the same up to that point.

Thereupon defendant rested.

During the progress of the trial the Court reserved his rulings on many of the objections to the testimony, going to the merits of the case, and suggested that these matters be taken up on final argument. At the conclusion of the testimony, the time for oral argument being limited, the Court made an order that, in lieu of oral argument, written briefs be filed and served by each side within certain specified times, which was done. (Tr. p. 107.)

At the commencement of the trial the Court also made an order that all adverse rulings of the Court should be deemed excepted to. (Tr. p. 55.) While no specific request was made to the Court for special findings, since the case was submitted on written briefs without oral argument, the contentions of both sides were fully set forth in the briefs, and there was no dispute as to the facts.

The Court filed its written decision and conceded practically all of the facts as outlined above, but decided as a proposition of law that plaintiff was not entitled to recover, and in so doing overruled many of the objections seasonably raised at the time of the trial by plaintiff, and allowed exceptions, all of which are embodied in the bill of exceptions.

Judgment for defendant was entered on May 11, 1920, and on June 5, 1920, within the 30 days allowed by rule 75 of the District Court, quoted on page 112 of transcript, plaintiff filed his petition for a new trial (Tr. pp. 112-116), which came on for hearing June 17, 1920, and after argument was

overruled by the Court on the same day. Plaintiff then moved the Court for an extension of time of 20 days or until July 8, 1920, within which to file and serve plaintiff's proposed bill of exceptions, which motion was argued by counsel for both sides. Rule 76 (Tr. pp. 120-121) provides for filing proposed bill of exceptions within 10 days after written notice of the decision. The Court considered the fact of the pendency of the motion for new trial and on June 17, 1920, a day of the regular term at which the case was tried, made an order extending plaintiff's time for filing and serving his proposed bill of exceptions to and until July 8, 1920. (Tr. pp. 116-117.)

The bill of exceptions was filed and served on July 2, 1920, and settled and allowed by the Court on July 16, 1920 (Tr. p. 122), and embraces all of the testimony and a statement of all the evidence introduced and offered at the trial. (Tr. p. 112.)

On July 12, 1920, defendant filed a motion to strike the proposed bill of exceptions from the files, and also the portion thereof relating to the proceedings on the motion to remand. (Tr. pp. 117-120.) The Court denied the motion to strike the entire bill of exceptions, but sustained the motion to strike the portion relating to the motion to remand, on the ground that these proceedings were not had at the same term at which the case was tried, to which ruling plaintiff was allowed an exception. (Tr. p. 120.) The record, however, shows that all the evi-

dence before the Court on the motion to remand is included in the transcript. (Tr. pp. 54 and 120.)

SPECIFICATIONS OF ERROR.

The assignments of error set forth in full on pages 124-126 of transcript, and which are intended to be urged and relied upon in this Court, for purposes of brevity and convenience, will be grouped and considered in the following order:

1. The Court erred in denying the motion of the plaintiff in error to remand said cause to the District Court of the Third judicial district of the State of Idaho, in and for the county of Ada, and in entering its order dated the 10th day of October, 1919, denying said motion to remand, and in denying the application of plaintiff in error to make a further showing as to his residence and citizenship at the time said action was commenced and since that time, and in sustaining defendant's motion to strike from the bill of exceptions that portion thereof relating to the motion to remand.

2. Since the Court held that the clause on the telegraph blank providing that the claim for damages must be presented in writing within 60 days after the telegram is filed with the company for transmission did not apply to plaintiff in this case because he did not learn of the failure to transmit until after that period, it was error for the Court to hold that the claim should have been presented in writing within 60 days after plaintiff first learned that fact,

and to hold that the presentation of such claim in writing and within that time, was not waived by the defendant, since plaintiff, upon learning the facts, immediately notified defendant, who took up the matter for complete investigation, and plaintiff at once filed the claim in writing as soon as directed to do so by defendant.

3. The Court erred in not holding that the unexplained failure to transmit the message by defendant, and its false statements to the sender that the message had been sent and delivered to plaintiff at Oakland, constituted negligence of such a character that it was not within the intent and meaning of the conditions and limitations of the contract relating to unrepeatd and specially valued messages, and that such conditions were not a defense in this case, and in holding that there was nothing unusual on the face of the telegram to impress defendant with its importance.

4. The Court erred in holding that the evidence did not show that plaintiff was damaged by defendant's failure to send the telegram since he might not have accepted it and might not have been able, at that time, to have obtained his stock for the purpose of selling it.

5. The Court erred in entering judgment in favor of defendant and against plaintiff for costs.

ARGUMENT.

I.

The Court below was without jurisdiction.

With reference to the first assignment of errors, if the question of urging it this time rested entirely with counsel for plaintiff, his inclination would be not to insist upon it, as he feels that plaintiff would be safe in standing upon the merits of the remaining specifications of error and would thereby secure speedier justice than if the case were remanded to the State Court, but in deference to the plaintiff, who feels that the showing made by him as to his residence was so conclusive that it should not have been disregarded by the Court below, it would seem to be our duty to plaintiff to urge it at the outset. While the Court below sustained the motion to strike this part of the bill of exceptions, we, nevertheless, believe that the record is in such shape that it should be considered by this Court, for the following reasons:

The motion to remand was heard entirely upon affidavits, and the Court below has twice certified that the record contains all the evidence before the Court used on this motion. On page 54 it is stated, "The foregoing affidavits constitute all the evidence before the Court used upon said motion to remand." On page 120 is the following statement: "The affidavits and papers relating to the motion to remand as set forth in the foregoing bill of exceptions, were all of the affidavits and evidence before the Court on the motion to remand."

In the order denying the motion to remand on page 54, it was ordered that plaintiff be allowed an exception to such ruling. On page 55 an exception was also allowed plaintiff to the refusal of the Court to permit a further showing as to plaintiff's residence and citizenship. Thus we have in the record all of the evidence used below in the hearing, properly certified, with timely and proper exceptions to the rulings. It seems to us that regardless of the technical question as to whether it was properly incorporated in the bill of exceptions or not, it may properly be considered by the Court as within the intent and spirit of the amendment of February 26, 1919, to Section 269 of the Judiciary Code, which is as follows:

“Sec. 269. All of the said Courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the Courts of Law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.”

If our position in this is correct, we respectfully call the Court's attention to the verified motion to remand, commencing on page 45, and the affidavits following of responsible and disinterested witnesses, all of whom testified that on June 13, 1919, when the action was commenced, plaintiff was and ever since has been a resident and citizen of California. The

only showing made by defendant was that plaintiff had been a registered voter at Warren, Idaho, where his mines were located, in 1916 and 1918, and voted there at the elections in those years, and that plaintiff had registered at a Boise hotel from Warren, Idaho, in June and July, 1919. There was also a certificate from the Secretary of State that plaintiff held the office of Commissioner of Immigration, Labor and Statistics for the State of Idaho from January 25, 1915 to January 25, 1917. This was the extent of the proof submitted by defendant.

The question related to the specific date on which the action was commenced, which was June 13, 1919. The evidence offered by defendant did not touch this date, except that relating to the registration at the hotel, which could not be considered of any weight as bearing upon the question of the legal domicile of a party, since it is a common practice for persons to register from the last place from which they arrive. That plaintiff should have registered from Warren, would signify nothing in that respect, because his mining interests in Idaho were located there and while temporarily in the State looking after those interests he would spend his time at Warren. The fact is much more significant that, although he had previously held office and been a voter in Idaho, after the State election in November, 1918, he refused to serve any longer as a member of the county central committee in Idaho county, on the ground that he was no longer a legal resident of the State of Idaho,

and that his home and legal residence were in the State of California. (Affidavit of Roden, Tr. p. 50.)

It would therefore seem conclusive that immediately after the election in November, 1918, plaintiff definitely decided upon the step which he had previously contemplated, of making his legal residence and domicile in California. He had previously bought a home there, where his wife and son were living, the former greatly benefited in health by the change, and the latter attending the schools of California. The verified complaint filed in the State Court, when there was no thought of the question of domicile arising, recited in the third allegation (Tr. p. 8), that plaintiff was about to leave Boise for his home in Oakland, California, and again at the end of the same allegation and in the fourth allegation. The proof also shows that plaintiff spent most of his time at his home in Oakland. We are at a loss to understand how the Court, on this evidence, could decide, as a matter of fact, that on June 13, 1919, plaintiff was a legal resident of Idaho. Without further considering the affidavits in detail, we respectfully and earnestly request this Court to read the evidence found in the record on this point, from pages 45 to 54, inclusive.

II.

The 60-Day Clause.

On this point we respectfully present two distinct points for consideration:

1. There is no provision requiring the presentation of a claim in writing within any specific time after plaintiff learns of defendant's default.

2. Both the time and manner of presenting the claim were waived by defendant.

1. It is conceded by the Court in his decision (Tr. p. 38), that this clause requiring claims for damages to be presented in writing within 60 days "after the telegram is filed with the company for transmission", would have to be held unreasonable in this case, for the parties concerned were wholly ignorant of defendant's failure to transmit the message until after the expiration of that time.

The Court held, however, that this period of limitation began to run when plaintiff learned of the default, and that he had 60 days thereafter in which to present his claim. The Court states that he does not find that the precise point has been passed upon, but that such seems to be the view implied in two cases, one of which was decided by this Court, to both of which we will hereafter refer. It should be noted, first of all, that the defendant's answer does not raise the latter issue. The defense relating to the 60-day clause is the second separate defense on pages 20-22 of the transcript, and merely sets up the defense: "That no claim in writing was presented to defendant within 60 days after the telegram was filed with defendant for transmission, or at any time or at all, except on or about the 18th day of June, 1918."

This would seem to be the extent to which this clause could operate as a defense, since it does not provide that the claim must be filed within 60 days after the party first learns of the mistake or failure to transmit, or within a reasonable time thereafter, as is provided, for example, in the bills of lading of carriers.

As the contract in the case at bar makes no provision as to the time for the presentation of a claim after the party first learns of the default, it might perhaps with reason be contended that the party would have a reasonable time thereafter, in view of all the circumstances of the case, within which to present his claim. There would seem to be no basis for holding that such time should be 60 days or any other specific time. This amounts to adding to the contract something which is not there. The limitation is for the benefit of defendant and of its own creation. It has no right, therefore, to ask that the contract be extended for its own benefit and for the purpose of declaring plaintiff in default, beyond the letter of the instrument, especially where the defendant itself has so wholly failed in its duty to plaintiff.

On this question, in the case of *Western Union Telegraph Company v. Way*, 83 Ala. 542, 4 So. 844, the Court on page 849, said:

“The limitation as to the time when a claim for damages must be presented is in the nature of a condition subsequent, the non-performance of which operates a forfeiture of all damages.

A condition operating as a forfeiture, not being favored, will not be extended beyond the express or clearly implied terms."

In *Western Union Co. v. Yopst*, 118 Ind. 248; 20 N. E. 222; 3 L. R. A. 224, the Court on page 227 of the N. E., said:

"There is no valid reason why the words of the contract should be extended in favor of the company to cases which they do not embrace. The limitation is for the benefit of the company, and is of its own creation. It has no right, therefore, to ask that the contract be extended for its own benefit beyond the letter of the instrument. Nor is there any ambiguity in the language employed, for it clearly designates the cases in which the limitation shall apply. The company is invested with comprehensive powers and rights, and is by law charged with duties to the public in consideration of the rights and franchises granted to it. It is impressed with a public character, and its duties are similar in many respects to those of a common carrier. *Hackett v. State*, 105 Ind. 250; 5 N. E. 178.

"It ought not, therefore, to be permitted to successfully insist that a limitation of its own creation, and established for its own benefit, should be extended beyond the words creating the limitation."

The Court below cited the case of *Postal Tel. Cable Co. v. Nichols*, 159 Fed. 643, decided by this Court, as seeming to support the view that the claim must be presented within 60 days after plaintiff learned of the default. We respectfully submit, however, that this Court did not so hold. The clause on the

telegraph blank was the same as in this case. After quoting it, on page 647, the Court said:

“The message was not repeated, the delay occurred upon a connecting line, and no claim for damages was presented in writing within 60 days after the message was filed with the company for transmission.”

The Court goes on to show that defendant was guilty of gross negligence in not notifying the sender of the break in its line, against which it could not contract, which applies also to this case. The only other reference to the 60-day clause is found in the concluding paragraph of the opinion. The telegram was filed for transmission on June 12, 1903, the senders had knowledge of the failure to transmit on July 11, following, and filed their claim for damages on August 17, 1903, or after the 60-day period had expired, and the Court held that they were entitled to recover. This case is stronger for plaintiff than that case because there the senders knew on July 11, 1903, which was well within the 60-day period, of the non-delivery, and still had a full month within which to file their claim before the expiration of the 60-day period. Here plaintiff's knowledge was not acquired until long after the 60-day period had expired. We find no language in the Nichols case which can be construed as holding that the claim must be presented within 60 days after knowledge of the defendant's negligence.

In *Western Union Tel. Co. v. Lee* (Ky), 192 S. W.

70, the only other case cited by the Court below, the same condition exists as in the Nichols case. All that is said by the Court on this question is found in the last paragraph on page 75, as follows:

“The plea that there can be no recovery because the plaintiff failed to present a claim, in writing, within 60 days after the telegram was filed with the company for transmission, cannot avail. The telegram was sent on March 3, 1915, and this action was filed on May 14, 1915. But plaintiff did not know the telegram had not been sent to him until March 26, 1915, and, of course, could not be expected to give notice of something he did not know. The suit was filed within 60 days after plaintiff learned of the company’s default, and constituted a sufficient written notice of the plaintiff’s claim.”

The precise question arose in the case of

Larsen v. Postal Tel. Cable Co., 150 Iowa 748; 130 N. W. 813, where the telegram was dated May 12, 1906, but was never delivered and the addressee did not learn the facts until some time in June, 1906. No claim in writing was filed until January 31, 1907. The question arose under a statute of Iowa which provided that no action could be maintained against a telegraph company for the recovery of such damages unless a claim therefor is presented in writing to such company within 60 days from time cause of action accrues. Although this provision was in a State statute, the reasoning on this point applies with equal force to this case. The Court said:

"If a message is erroneously transmitted or there is an actual delivery, though unreasonably delayed, the addressee receives the communication and is informed therefrom of the mistake or negligence of the company, and under such circumstances it is no hardship to require him to present his claim within such reasonable time as the legislature may require, in order that it may investigate while the facts are fresh, and remedy the irregularity, if any existing, in the interest of the service. But in the case of non-delivery, the addressee ordinarily is not aware of the existence of the message. Only the sender and the company may know of this until long after the 60 days prescribed have elapsed, and it would seem unjust to deprive him of all remedy, in the absence of any fault on his part. Only the carrier may be aware of the non-delivery, and it ought not to be permitted to escape liability for negligence by according to this statute a meaning which would extend its scope beyond relief for the mischief intended. As there was no delivery, the omission cannot be construed as a mere delay, and plaintiff was not required to present his claim to the company before beginning the action."

2. The evidence clearly shows that it was with the consent and at the express direction of defendant that plaintiff filed the claim on June 18, 1918, and that the matter had been under investigation by the defendant ever since plaintiff and T. J. Jones called it to defendant's attention, about February 15, 1918. The defendant accepted without objections the oral notice of the claim for damages made to its Boise manager by plaintiff at that time. Mr. Hackett

promised to investigate it and almost immediately took up the matter of settlement of the claim. When Mr. Jones, after consulting with plaintiff, returned the 65 cents toll to Mr. Hackett, he informed him that he did so because an acceptance of it might be construed as a settlement of the matter. Thus defendant's manager at Boise was notified from the start of the claim that plaintiff was making, and the manager informed Mr. Jones that the company was liable and would settle and stated the basis upon which the company would settle, which was the difference between the value of the stock at that time, and what Miller offered for it. Mr. Hackett then attempted to ascertain whether the stock had any value, as the bank was then in liquidation. He said he had taken it up with the company and wanted Mr. Jones to fix the value of the stock as he thought he would be fair. This clearly left the impression that there was an understanding to that effect between Mr. Hackett and the company. In such case there could be no necessity for filing a written claim, as the company was already apprised of the situation and was negotiating a settlement and could not be prejudiced in any way, and there was nothing further for plaintiff to do but to await the result of Mr. Hackett's negotiations with the company. After a reasonable time had elapsed and nothing resulted in the way of settlement, and after plaintiff had received a communication from some one connected with the defendant at Salt Lake, Mr. Hackett, the

manager, suggested to plaintiff that he address a written communication to him at Boise. This was done by plaintiff on June 18, 1918, and in the letter he outlined the facts in detail. Mr. Hackett sent this letter on to the company, and wrote plaintiff under date of June 19, 1918, stating that he had done so, and again asked regarding the value of the stock. In his letter he said: "Am I to understand that the stock has no value at present? Was there not some value to the stock when you first discovered the message had not been sent about the middle of February when you returned to Boise?" (Tr. p. 82.) This is further evidence that plaintiff was justified in believing from the start that the matter of settlement was being considered by defendant, and no prejudice, injury or inconvenience could have resulted to defendant by plaintiff's failure to file the formal claim in writing at an earlier date.

We will now call attention to the reply to this letter from Mr. Life, district commercial superintendent at Salt Lake, on page 81 of the record, in which he states: "Beg to advise this matter has been taken under immediate investigation upon conclusion of which you will be communicated with further."

The remaining paragraph of the letter was construed by the Court below to mean that this promise to investigate was made without waiving the defense that the claim was barred by reason of plaintiff's failure to make demand within the period specified on the telegraph blank. (Tr. p. 35.) If such was

Mr. Life's intention, we think the language he employed fails to convey that meaning. Mr. Life also interprets this clause, as does the defendant in its answer, to mean nothing other than that the claim must be filed within the 60 days *from date message was filed*, which was impossible in this case. He then says the investigation will be conducted without prejudice to the situation created by plaintiff's failure to bring matter to their attention at an earlier date. The reasonable construction of this language in view of the situation at that time, would be that Mr. Life would investigate the matter regardless of the 60-day clause, and at the conclusion of the investigation communicate further with plaintiff. If he intended to ultimately urge this defense, what was the need of investigating at all? Fairness and good faith would seem to require of him that he either investigate the matter, and if he found the company at fault, recommend a settlement; or notify plaintiff at once that he considered the claim barred by the 60-day clause, so that plaintiff could take such further action as he might desire. Moreover, the statement in the letter with reference to the failure of plaintiff to bring the matter to their attention at an earlier date is untrue and self-serving, as the evidence conclusively shows that it was brought to their attention as soon as plaintiff learned of it, and had been under investigation and process of settlement ever since that time.

Mr. Life, even if so disposed, could not by an equivocal statement of that kind in his letter, set aside the legal effect of these prior transactions, as a waiver by defendant of this provision of the contract.

If Mr. Life intended in his letter to convey the meaning claimed for it, he might easily have made his meaning clear by a simple statement that their investigation would be conducted without waiving their rights, under that clause of the contract.

That a provision of this kind can be waived by the company, by such acts as are shown in this case, is abundantly established by the authorities.

It will be observed that while the business of telegraph companies has been brought within certain provisions of the Interstate Commerce Act and the commission is given power to fix reasonable rates and regulations, this case is not governed by the provisions of that act which relate to the liability of carriers of passengers and freight providing against discrimination as between shippers and time within which claims for damages or misdelivery must be presented and suit thereon commenced, commonly known as the Carmack Amendment of the Hepburn Bill (24 Stat. at L. 379, Chap. 104, as amended by the Act of June 29, 1906, 34 St. at L. 593, Chap 3591, Comp. St. 1913, Sec. 8592), and the decisions of the Supreme Court under that portion of the act have no application to this case. Such were the cases of *Georgia F. & A. R. Co. v. Blish Milling Co.*, 241 U. S.

190, followed by this Court in *Gooch v. Oregon Short L. R. Co.*, 264 F. 664, and the other cases against railway companies cited by the Court below on page 38 of the transcript. See also note *L. R. A. 1916 D.*, p. 1049-1059.

This case is therefore governed by the rules of the common law relating to waiver.

The case of *Wheelock v. Postal Cable Co.*, 196 Mass. 119; 83 N. E. 313, 314-15, is very similar as to the facts relating to waiver to this case. The telegram was never received by the addressee, and the plaintiffs had no knowledge of this fact until about six weeks after it was delivered to the company for transmission, and did not file their claim within the 60 days from the date the telegram was filed with the company. The provisions of the telegraph blank were the same as those in this case. When the plaintiffs learned that the telegram had not been delivered, they sent their clerk to the defendant's office, who saw the general manager and asked for an explanation. Within a few days he called once or twice more and was informed that nothing had been learned. Then the defendant's manager wrote plaintiffs a letter stating that they were investigating the service of the telegram, and that the investigation would be most thorough and the party at fault for any negligence would be promptly reprimanded, and that they would communicate further with plaintiffs. Ten days after this a representative of the defendant called at the plaintiffs' office and ten-

dered one of the firm the amount of the tolls for sending the message, stating that this was all that the defendant would do and asking for a receipt for the money. The plaintiffs refused to accept the money. No further communication was received from defendant until April 4th, which was about three months after the telegram had been filed with the company, when the defendant handed plaintiffs a letter dated April 3d written by the superintendent of defendant's claim department to defendant's general superintendent, which referred to plaintiffs' complaint in regard to the telegram and continued as follows:

"Investigation shows that this message was promptly transmitted from originating station, but in view of the statement of the firm in Melbourne to whom it is said to have been intended, that they did not receive it, the tolls may be refunded to the sender. This would be the full extent of the liability of the company in whose hands the failure may be shown to have occurred."

Immediately afterwards the plaintiff consulted counsel for the first time in regard to the matter. On April 12th they sent the defendant a written claim for damages growing out of the loss of the message. On May 14th defendant sent to plaintiffs' counsel a letter written by its vice president to its general superintendent, referring to the letter of counsel in regard to the claim, and saying that the company had never received any claim from the

plaintiffs but had received an oral complaint about the message. The letter went on to state the facts in regard to the receipt of the message for transmission, and the result of the investigation, and the offer of the defendant to return the tolls to the sender. It ended with these words:

“Of course we could not have favorably considered any other claim in the matter. Please advise the attorneys accordingly.”

The Court first considers the question relating to that part of the contract which relieves the company from liability “where the claim is not presented in writing within 60 days after the filing of the message.” The Court said:

“Such a stipulation is a reasonable provision for the protection of the company against stale claims, and for securing an opportunity to investigate claims founded on an alleged breach of contract, or any negligence, before the facts pass out of the memory of those who ought to know them. The validity of this kind of requirement has been sustained by a great weight of authority.”

The Court cites a large number of cases in support of this view. The Court continues:

“It is contended by the plaintiffs that this requirement was waived by the defendant. Questions like that which arise on this contention have often been considered in suits upon policies of insurance. There was a series of communications between the parties touching the subject, in all of which, from first to last, the defendant

discussed the question of liability on its merits, and professed in the beginning to intend to deal with it, and finally to have dealt with it, in reference to rights created by other parts of the contract, apart from any question as to the formal presentation of a claim in writing. The defendant's conduct in regard to it was such as naturally to throw the plaintiffs off their guard, and it appears that they did not read this stipulation nor consult counsel about their claim until after the 60 days had expired. We think they naturally might infer from the defendant's conduct that the claim was to be considered and determined upon its merits, and that there was no intention to set up a formal or technical defense, founded on the time or manner of presenting the claim. We are of opinion that there was evidence for the jury on the question whether the defendant waived its right to rely upon this defense. *Walker v. Lancashire Ins. Co.*, 188 Mass. 560, 75 N. E. 66; *Graves v. Washington Marine Fire Ins. Co.*, 12 Allen, 391; *Searle v. Dwelling House Ins. Co.*, 152 Mass. 263-265, 25 N. E. 290; *Brown v. Henry*, 172 Mass. 559-567, 52 N. E. 1073; *Moore v. Wildey Casualty Co.*, 176 Mass. 418, 57 N. E. 673; *Hill v. Western Union Telegraph Co.*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; *Hays v. Western Union Telegraph Co.*, 70 S. C. 16, 48 S. E. 608, 67 L. R. A. 481, 106 Am. St. Rep. 731; *Western Union Telegraph Co. v. Stratemeier*, 6 Ind. App. 125-130, 32 N. E. 871."

In *Western Union Tel. Co. v. Heathcoat*, 149 Ala. 423, 43 So. 117, the Court, on this point, on page 120, said:

"While the defendant was entitled to have the claim for damages presented in writing within

60 days after the message was delivered for transmission, we think there is no doubt that the right is a limitation for the benefit of the defendant, is of its own creation, and may be waived by it, and the waiver may rest in parol. 27 Am. & Eng. Ency. Law (2d Ed.) p. 1049; Hill v. Western Union Tel. Co., 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; 1 Elliott on Ev. 596."

On the question of the authority of the local agent in charge of the company's office to waive presentation of the claim in writing, the Court, on the same page, said:

"Another insistence of the appellant is that the agent at Birmingham (Williams), to whom it is claimed by plaintiff the oral claim for damages was presented, had no authority to waive presentation of the claim in writing. Williams testified he had no authority to waive any of the rules or regulations on the back of the blanks, and that he had no authority to change any of the rules of the company. But he also testified that he was at the time general manager of defendant's local office at Birmingham, and head man there, and in charge of the company's business there. Notwithstanding the testimony of the agent that he was without authority, he was a general agent. It was his duty to transact generally the telegraphic business at Birmingham. There is no evidence tending to show that plaintiff, or her agent who was representing her, knew of any limitation imposed by the defendant upon the authority of Williams. If the jury should find from the evidence there was a waiver by Williams of a written presentation of the claim, the defendant would be bound by his acts in this respect. Western

Union Tel. Co. v. Cunningham, 99 Ala. 314, 14 South 579; Syndicate Insurance Co. v. Catchings, 104 Ala. 176, 16 South 46; Western Union Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480; Hill v. Western Union, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; 27 Am. & Eng. Ency. Law (2d Ed.) 1048, and cases collected in note 13."

In the case of Hill v. Western Union Tel. Co., 85 Ga. 425, 11 S. E. 874, the Court held that in ordinary cases the provision relating to the presentation of the claim in writing within 60 days is reasonable and valid, and also held:

"The agent or manager of the company on duty at the station from which the message is sent, is a proper person upon whom to make demand for the damages claimed, and he is competent to recognize and act upon an oral demand and thus waive any writing. Such a waiver will result from his refusal to pay, upon the sole ground that the company was not to blame."

In Western Union Tel. Co. v. Stratemeier (Ind. App.) 32 N. E. 871, the Court, on the question of waiver, on page 872, said:

"The condition in the contract requiring the claim for damages to be presented in writing within 60 days is reasonable and valid, and is a condition precedent to a right to recover; but like all other conditions, the breach of which may defeat substantial rights, it should be strictly construed, and is subject to be waived. That condition was evidently designed to furnish appellant with reliable information respecting the claim for damages, to enable it to investigate the subject while the facts were

fresh and readily accessible; and it had the unquestioned right to insist upon the literal fulfillment of the condition before giving attention to the claim. *Telegraph Co. v. Trumbull*, 1 Ind. App. 121, 27 N. E. Rep. 313. But it appears from the pleading under consideration that appellant acted upon an oral presentation of the claim, and investigated the matter. Upon such presentation, it entered into a correspondence with appellee concerning the claim, and offered him money in settlement of his damages; thus recognizing a liability without demanding of him the performance of the condition. Having entered upon the investigation of the claim upon appellee's oral complaint, he might well have presumed appellant would ask him for further and more accurate information, if it had been desired. In the case of *Hill v. Telegraph Co.*, 85 Ga. 425, 11 S. E. Rep. 874, the message was sent under the same kind of a contract, and the plaintiff made an oral complaint to the company's agent within three weeks after the message was sent. The agent told him to wait, and the matter would be investigated. About two weeks thereafter the agent informed the plaintiff that the company was not liable, and would not pay the claim. It was held that the condition requiring the claim to be presented in writing was waived. In the course of the opinion the Court said: 'The agent was not bound to recognize an oral demand. But if he did so, making no objection to it on the ground that it was not in writing, we think it was sufficient.' In the case of *Massengale v. Telegraph Co.*, 17 Mo. App. 257, it was held that the promise of the general agent of the company to 'look into the matter' upon an oral demand by the plaintiff did not amount to a waiver of the condition requiring the demand to be in writing. Prof. Thompson,

in his work on the Law of Electricity (section 262) says that the conclusion was reached in that case upon 'questionable grounds.' The doctrine of the Georgia case is supported by the principles governing similar conditions in other classes of contracts, and it meets with the unqualified approval of this Court. *Haven v. Insurance Co.*, 111 Ind. 90, 12 N. E. Rep. 137; *Insurance Co. v. Marple*, 1 Ind. App. 411, 27 N. E. Rep. 633. In accordance with these observations, it must be held that the facts contained in the reply in question constituted a waiver of the condition requiring the claim to be presented in writing."

In *Hays & Bro. v. Western Union Tel. Co.*, 70 S. C. 16, 48 S. E. 608, the Court held:

"Where a blank used in sending telegrams provides that a claim for damages must be made in writing within 60 days, a waiver of the condition may be shown by acts of the company's agent in accepting verbal statements as to damage, and seeking information of plaintiffs as to the merits of their claim, within the time limited by the blank."

In *Western Union Tel. Co. v. Fitts (Ga.)*, 79 S. E. 156, the Court held:

"The evidence was sufficient to show a waiver of the condition of the contract printed upon the telegraph blank, which requires the claim for damages to be presented in writing. The testimony that the telegraph company received an oral demand, and within a week after the message was sent acted upon it and investigated the claim, is undisputed."

"And though the agent is not bound to recog-

nize an oral demand, if he does so, making no objection upon the ground that it is not in writing, a waiver of the written demand will result."

The Court further held that after this waiver,

"The company was not restored to its original right to insist upon a written claim for damages merely because, after the expiration of the 60 days, the sender's attorney transmitted to the telegraph company a claim in writing in which the damages were specifically set forth and enumerated."

The decisions of the Courts are more numerous with reference to the waiver of provisions in insurance policies which provide that the non-payment of a premium, in case of life insurance policies, on the date when due, will render the policy void and non-enforceable; and in case of fire insurance policies where it is provided that the insured shall furnish sworn proofs of loss within 60 days after the fire.

In the case of *Insurance Co. v. Norton*, 96 U. S. 234, the Court held:

"An insurance company may waive any condition of a policy inserted therein for its benefit.

"As the company may at any time at its option give authority to its agents to make agreements or to waive forfeiture, it is not bound to act upon the declaration in its policy that they have no such authority.

"Whether it has or has not exercised that option is a fact provable by either written evidence or by parol."

In the case of Insurance Co. v. Eggleston, 96 U. S. 572, 577, the Court said:

“We have recently, in the case of Insurance Co. v. Norton (*supra*, p. 234), shown that forfeitures are not favored in the law, and that Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration or course of action on the part of an insurance company, which leads the party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract.”

The same ruling was followed in

Hartford Life Insurance Co. v. Unsell, 144 U. S. 439, and by the Circuit Court of Appeals of the Fifth circuit in

Talbot v. Metropolitan Life Insurance Co., 142 Fed. 694.

In McCullough v. Home Ins. Co., 155 Cal. 659; 102 Pac. 914, which was an action on a fire insurance policy which contained the usual clause requiring the insured to furnish sworn proofs of loss within 60 days after the fire, which was not done, the Court held that this requirement was waived where the plaintiff gave verbal notice to the agent within a few days after the fire, and the company proceeded to investigate the loss, and no denial of liability was

made by the company until more than 60 days had elapsed from the time of the fire.

The Court held that this was the law, regardless of the clause of the policy providing that no officer, agent or other representative of the company should have power to waive any condition of the policy, except such as may be endorsed thereon or added thereto, and regardless of the further fact that plaintiff had signed a "non-waiver agreement" during the pendency of the negotiations, which paper provided that any action taken by the company in investigating the cause of fire and the amount of loss and damage, should not waive or invalidate any of the conditions of the policy.

See also *Fireman's Fund Ins. Co. v. Norwood* (C. C. A. 8th Cir.), 69 Fed. 71.

This rule is followed uniformly by the Federal and State Courts.

Even in the case of *Georgia F. & A. Ry. v. Blish Co.*, 241 U. S. 190, which was decided specifically under the Carmack Amendment relating to carriers and shippers of goods, the Court, on page 198, held that a formal notice of the claim for loss was not necessary, and that a substantial compliance with the rule was sufficient, where it apprised the carrier of the character of the claim, although it was not strictly accurate and no prejudice resulted. The Court said:

"Granting that the stipulation is applicable and valid, it does not require documents in a

particular form. It is addressed to a practical exigency, and it is to be construed in a practical way. The stipulation required that the claim should be made in writing, but a telegram which in itself or taken with other telegrams contained an adequate statement must be deemed to satisfy this requirement." (Citing cases.)

As pointed out above, there is nothing in the Acts of Congress disabling the defendant from waiving this provision of the contract.

We therefore respectfully submit that the 60-day clause was not a defense to the action, for the following reasons:

1. As held by the Court below, it would be unreasonable to apply this clause, because plaintiff had no knowledge of the facts until long after the 60 days had expired; and there is no provision requiring such claim in writing to be presented in any stated time after plaintiff first learns the facts, and there are no decisions of any Court to that effect.

2. If such a requirement were necessary, the filing of it in writing within that time was waived by defendant, because plaintiff, immediately upon learning the facts, notified the defendant through its manager, Hackett, who acknowledged such notice verbally and by letter, and at once began an investigation, and stated that he had taken it up with the company and that it would be settled; and the further fact that as soon as requested by defendant and at its suggestion, plaintiff presented a formal written claim, which was all that could reasonably

be required of plaintiff; and the defendant was not in any manner prejudiced by failure to receive this formal written claim at an earlier date.

III.

The remaining defenses, relating to unrepeated and specially valued messages, do not apply where defendant was guilty of gross or willful negligence.

We feel justified in the statement that from the evidence in this case the defendant was guilty of such negligence as amounts, to all intents and purposes, to fraud.

Its business was to send messages by telegraph, which is of a quasi-public nature, and it owed certain duties to the public, even in relation to ordinary, unrepeated telegrams. In this case it accepted the message for transmission, together with the regular charges therefor. Although the learned Judge who tried the case thought otherwise, we respectfully contend that the message, on its face, showed its importance, since it related to an offer of \$90.00 per share for stock in a bank which might go into liquidation with a year's delay unless the offer were accepted, and a statement that liquidation would follow unless Miller got two-thirds of the stock, and requested an answer. It would seem to us that the importance of such a message would at once impress itself upon the mind of anyone engaged in the business of sending telegrams. The defendant not only failed to send the message at all, but when the sender

inquired about it within a day or two following, its agent looked through some files and papers, and told him that it had been sent; and when he again inquired, the agent again looked through some files and informed him that it had been delivered to plaintiff at Oakland. The conclusion is inevitable that the agent either willfully misrepresented the facts, or that the files and papers of defendant were kept in a grossly negligent manner. The latter assumption can hardly be accepted as an explanation of defendant's conduct, since it is hard to conceive how the papers and files could show that the message had been sent and actually delivered to plaintiff at Oakland. A more plausible explanation, perhaps, would seem to be that the defendant did not care to be bothered with the matter, and made those statements as the easiest way out of it. The Court is left in the dark as to the true reasons, because the defendant has never at any time offered the slightest explanation or excuse for its failure of duty. If these facts do not constitute gross and willful negligence of a company charged with a duty to the public, it would be difficult to imagine a more flagrant case of that nature. If the defendant is not liable in a case of this kind, then it has absolutely no duty or obligation with respect to an unrepeatd message, and this class of service, in justice to the public, should be abolished. If such is the law, defendant can consign unrepeatd messages to the waste basket with immu-

ity from all liability, except the toll paid for the message.

This, however, is not in accordance with the authorities, and we find no reported cases in which it is held that these provisions of the contract exempt a telegraph company from liability for what is ordinarily termed gross negligence. This Court, in

Western Union Telegraph Co. v. Lange, 248 Fed. 656, uses the following language on page 662:

“We pass to the defenses based upon the stipulations upon the back of the message blank. It is pertinent to bear in mind that this action has little to do with any mistake in transmission of a telegraph message. The cause of action arises out of delay on the part of the telegraph company in transmission and delivery. Repetition of the message would have availed nothing, as no complaint is made that there was any mistake in the verbiage of the message. The legal duty of the telegraph company was to send the message with reasonable promptness at the regular rates and to deliver it. In *Box v. Postal Telegraph Cable Co.*, 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566, the Court of Appeals for the Fifth circuit said that the regulation of the company with respect to repeated messages, while purporting to be made to guard against mistakes or delays, should be construed to refer to such mistake and delays as could be corrected or avoided by repetition and comparison; otherwise, a delay caused by the conduct of the company in negligently failing to send or to attempt to send the message would come within the rule. ‘It is difficult,’ said the Court, ‘to believe that this stipulation was intended by the parties to be applicable to a case in which

the conduct of the company made it impossible for the message to be repeated.' As bearing upon the question we cite *Purdom Naval Stores Co. v. Western Union Telegraph Co.* (C. C.) 153 Fed. 327; *Postal Telegraph Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. A. 585, 19 L. R. A. (N. S.) 870, 14 Ann. Cas. 369; *Pacific Postal Telegraph Co. v. Fleischner et al.*, 66 Fed. 899, 14 C. C. A. 166. Cases like *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, and *Coit v. Western Union Telegraph Co.*, 130 Cal. 657, 63 Pac. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153, and others cited, which involved mistakes in the language of messages sent, are not authority upon the point here presented."

The Court further said, on page 663:

"It is said that under no circumstances should the Court have found that the telegraph company was guilty of gross negligence in the delay in transmission and delivery. Again we must hold against the defendant. The facts show that the situation of the plaintiffs was in great detail explained to the defendant's agent at the time that the telegram was delivered at Oakland for transmission, and that plaintiffs did all that they were advised to do to insure immediate delivery of the message. But, notwithstanding their special efforts and the assurances of the telegraph company, there was a failure to deliver until more than three days had gone by. In our opinion, the circumstances proved gross negligence. *Western Union Telegraph Co. v. Cook*, 61 Fed. 624, 9 C. C. A. 680; *Union Construction Co. v. Western Union Telegraph Co.*, 163 Cal. 298, 125 Pac. 242; *Pierson v. Western Union Telegraph Co.*, 150 N. C. 559, 64 S. E.

577; *Redington v. Pacific Postal Telegraph Co.*,
107 Cal. 317, 40 Pac. 432, 48 Am. St. Rep. 132.”

In defendant's brief in the Court below, attention was called to the fact that this case was then pending in the Supreme Court on writ of certiorari, but the decision had not then been announced. In the opinion of that Court as reported in the advance sheets of 40 Sup. Ct. Rep. 460, the only point considered was the nature of the contract relating to the sale of the mining property referred to in the message, and the Court held that it was an agreement to sell and purchase, and not an option to purchase, so that no damages were incurred. It follows, therefore, that the other propositions of law as announced by this Court are sound, and are controlling and remain the law in this circuit. While the learned Judge stated that he deemed that decision controlling, it seems to us that he failed to follow it, for the principles there announced should apply with equal force to the remaining special defenses set up in the answer, and would entitle plaintiff to recover in this case.

In the earlier case of *Western Union Telegraph Co. v. Cook*, 61 Fed. 624, this doctrine relating to gross negligence was recognized by this Court. The Court there held that this was a question of general law, to be decided by the Federal Court, irrespective of the decision of the highest Courts of the State construing the statute. The Court, on page 628, said:

“In the decisions of the Courts of the various States there is much conflict upon that question, some holding that such a stipulation is without consideration, and also void because against public policy; others, that, while not altogether invalid, it ought not to be held to exonerate the company from damages caused by defective instruments, or a want of skill or ordinary care on the part of its operators; and others, still, that it is a reasonable precaution, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated for any cause except willful misconduct or gross negligence on the part of the company. Many of the cases will be found referred to in *Hart v. Telegraph Co.*, *supra*, and in notes to the cases of *White v. Telegraph Co.*, 14 Fed. 718, and *Telegraph Co. v. Blanchard*, 45 Am. Rep. 486.”

Taking the line of authorities last mentioned which are most favorable to defendant, these clauses of the contract are no defense in case of gross negligence.

Again, in *Pac. Postal Tel. Co. v. Fleischner*, 66 Fed. 899, this Court had under consideration the question of how far a telegraph company could contract for exemption from gross negligence or fraud. The Court, on page 908, said:

“Now a regulation which would take a telegraph contract out of the rules that apply to all other contracts ought not to be favored as a reasonable one, considering the circumstances under which many telegrams are sent. It has been claimed that the forcing a stipulation into a contract for the transmission of a message by a

telegraph company which would exempt it from liability for gross negligence should be considered as having been agreed to under a sort of moral duress, and therefore void. Much more should a stipulation forced into a contract by such a company which would exempt it from a liability for a fraud be declared void. The question of stipulations upon telegraphic blanks is fully discussed in 25 Am. & Eng. Enc. Law, pp. 790-798. The authorities there collected, I think, sustain the author in the view that any stipulation which would exempt a telegraph company from liability for its gross negligence is void. Other text writers sustain the same view. Gray, Commun. Tel. Par. 40; Thomp. Electr. Pars. 188-193. Many authorities might be collected to the same effect. The case of *Primrose v. Telegraph Co.*, *supra*, does not establish a different doctrine. In that case the telegram was a cipher one. Neither its importance nor the purport was known to the company. There was a mistake in transmitting the same. The Court held that the regulation which required that such a message should be repeated was a reasonable one. But there was no holding in that case that the company, by any regulation, could exempt itself from liability for gross negligence or a fraud. The conclusion I have reached, therefore, is that, if the stipulation has the force claimed for it in this case by the plaintiff in error, it is void."

It is also true that there is nothing in the cases of *Postal Tel. Co. v. Warren Godwin L. Co.*, 40 Sup. Ct. Rep. 69, and *Western Union Tel. Co. v. Boegli*, *ibid.*, 167, which in any respect holds otherwise, nor will any decisions be found which hold contrary to this

doctrine of gross negligence as laid down in the decisions of this Court.

In the *Fleischner* case the gross negligence, which the Court said amounted to fraud, consisted in the company's not informing plaintiff that its wires between Portland and Seattle were down, after it had accepted a message for transmission over that line. That was a case of silence on the part of the company, but in the case at bar the negligence is equally great, if not greater, because the defendant informed the sender that the message had been sent and delivered to plaintiff at Oakland, when such statement was absolutely false and a proper examination of its records must have disclosed this fact. The making of this false statement to the sender, who was acting on behalf of the plaintiff in the transaction, mislead him to such an extent that he considered it unnecessary to send plaintiff another message or to attempt to further communicate with him with reference to the sale of his stock.

Also, in the *Nichols* case, 159 Fed. 643, this Court again applied the doctrine of gross negligence, and held that provisions in the telegraph blank relieving the company from liability beyond the price charged, for non-delivery of unrepeatd messages and for delays on connecting lines, are without effect where on receiving notice within a few minutes after undertaking to transmit an important message, if the lines are down, the company fails to notify the sender

of that fact. On this point this Court, on page 647, said:

“We have no hesitation in holding it to have been gross neglect on its part, against which it could not contract, not to notify the senders of the break in the line and the consequent interruption in the transmission of the message, that they might have protected themselves by communicating directly with the War Department at Washington. See *Fleischner v. Pacific Postal Telegraph Company* (C. C.) 55 Fed. 738; *Swan v. Western Union Telegraph Company*, 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153; *Western Union Telegraph Company v. Cook*, 61 Fed. 624, 9 C. C. A. 680.”

In *Swan v. Western Union Tel. Co.* (C. C. A., 7th Cir.), 129 Fed. 318, 67 L. R. A. 153 (and note), the Court followed and quoted from the decision of this Court in the *Fleischner* case. The message involved was addressed to plaintiff at Chicago, and sent by a mining engineer in Michigan advising plaintiff of a rich strike in the Mohawk Mine and advising him to make quick purchase of mining stock. There was such delay in the delivery of the message that meanwhile the Mohawk mining stock had risen in value and plaintiff was unable to purchase at as low a price as he could have purchased if the message had been promptly delivered. The Court held that it was gross negligence on the part of the company not to inform the sender of the wire trouble that delayed the message.

In *Box v. Postal Telegraph Cable Co.*, 165 Fed.

138, the Court of Appeals of the Fifth circuit, on page 141, with reference to the clause relating to repeated messages, said:

“The rule is not intended to secure a timely effort to send the message, but to make more certain its accurate transmission. The company is under obligation to send the message with reasonable promptness for the regular rate when it receives such rate and accepts the message. It could not, for example, willfully or negligently fail to send, or unreasonably delay the sending or attempting to send, the message, and defend on the plea that only the regular rate was paid and not the additional fee for repetition. The first lines of the rule show its meaning plainly:

“‘To guard against mistakes or delays, the sender of the message should order it repeated; that is, telegraphed back to the originating office for comparison.’

“The message must, of course, be sent before it can be repeated; it must be sent and repeated before any comparison could be made. Although the regulation purports to be made to guard against mistakes or delays, it should be construed to refer to such mistakes and delays as could be corrected or avoided by repetition and comparison; otherwise, a delay caused by the conduct of the company in negligently failing to send or to attempt to send the message would come within the rule. And it is held that it does not apply where ‘no effort was made to put the message on its transit.’ *Birney v. N. Y. & W. P. Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607.”

Applying the reasoning of the Court in the case last cited in which it construes the language of the

clause, to other language found in the regulation, it will be observed that the language employed is that the company shall not be liable "for mistakes or delays in transmission or delivery, or for non-delivery." It says nothing about total failure to transmit or attempt to transmit. It uses the expression "non-delivery", but does not use the expression "non-transmission" but merely delays or mistakes in transmission. Obviously these expressions are not equivalent to "non-transmission", because the expression "mistakes or delays in the transmission" refers only to delays after the message has been started on the wires; and, moreover, as held in the cases cited, this clause cannot excuse silence on the part of the company in withholding information in its possession which would necessarily cause delay, and *a fortiori*, it cannot excuse affirmative false statements to the effect that the message has been sent and delivered.

In *Purdom Naval Stores Co. v. Western Union Tel. Co.*, 153 Fed. 327, 332, the Court held that a rule of the telegraph company that it would not be liable for damages in case of an unrepeatd message was inapplicable where there was an utter failure to deliver the message at all, and distinguishes such a case from *Primrose v. Western Union Tel. Co.*, 154 U. S. 1.

The case of *Bowman & Bull v. Postal Tel. Co.*, a very recent case decided by the Supreme Court of Illinois, 124 N. E. 851, goes into a very complete

discussion of these questions. The Supreme Court, on March 1, 1920, refused a writ of certiorari in this case. See 40th Sup. Ct. Rep. 342. On page 858 of 124 N. E. the Court said:

“Furthermore, we think the evidence here shows a degree of carelessness that amounts to gross negligence, and it is admitted that appellee would be liable for gross negligence.”

Some of the rulings of the Court in this case are perhaps not in line with the decisions of the Supreme Court in the Warren-Godwin case, but we think that the writ of certiorari was denied on the ground of the gross negligence of the company, which shows that it is not the purpose of the Supreme Court to extend protection to a telegraph company, under these clauses, to cases of gross negligence.

The same rule is followed in *Western Union Telegraph Co. v. Dorrough* (Tex. Civ. App.), 213 S. W. 282.

In *Lothian v. Western Union Tel. Co.* (N. D.), 126 N. W. 621, the Court held that the non-delivery of a prepaid telegram was in itself gross negligence as a matter of law, in the absence of a showing on the part of the company of exculpatory facts, and that, while the liability of the company may be limited by the special contract, it cannot exonerate itself in anticipation thereof, from liability for its gross negligence, fraud or willful wrong. The court defined gross negligence as “Want of slight care and diligence”, citing 29 Cyc. 423.

This term is defined by the Supreme Court in *Preston v. Prather*, 137 U. S. 604, 608-9, as nothing more than a failure to bestow the care which the property in its situation demands.

In *Birney v. Printing Co.*, 18 Md. 341, 81 Am. Dec. 607, it was held that the exemption from liability for the non-transmission and non-delivery of unrepeatd messages does not apply where no effort was made by the company to send the message. The Court said:

“The terms of the notice in which exemption from liability is declared clearly imply an obligation on the part of the company to attempt the transmission and delivery of a message received by it for that purpose, and it would be most unreasonable to permit it to have the benefit of an exemption from liability without first bringing itself within the scope of the exemption provided for, by a full and faithful performance of its implied duties.”

The rule in New York is stated in *Pierce Co. v. Western Union Telegraph Co.* (S. C.), 177 N. Y. Sup. 598, in the following language, on page 599:

“This action is based upon gross negligence. It is alleged that the defendant failed to transmit a telegram, which had been delivered to one of its agents. This would constitute gross negligence as a matter of law. *Weld v. Postal Tel. Cable Co.*, 210 N. Y. 59-77, 103 N. E. 957. Where the action is not based upon gross negligence, and the message is not repeated, the damages are limited to the amount received for sending the same, provided the contract so stipulates. *Halsted v. Postal Tel. C. Co.*, 193 N. Y. 293-304,

85 N. E. 1078, 19 L. R. A. (N. S.) 1021, 127 Am. St. Rep. 952; *Kiley v. Western Union T. Co.*, 109 N. Y. 231, 16 N. E. 75; *Monsees v. Western Union Telegraph Co.*, 127 App. Div. 289, 111 N. Y. Supp. 53. But a telegraph company cannot limit its liability by any such provision, where the action is based upon gross negligence. *Weld v. Postal Tel. C. Co.*; 210 N. Y. 59, 103 N. E. 957; *Id.*, 199 N. Y. 88-98, 92 N. E. 415; *Id.*, 148 App. Div. 588-590, 133 N. Y. Supp. 228; *Will v. Postal Tel. C. Co.*, 3 App. Div. 23, 37 N. Y. Supp. 933; *Dixon v. Western U. T. Co.*, 3 App. Div. 60-64, 38 N. Y. Supp. 1056; *Empire Roller Rink Co. v. Western U. T. Co.*, 75 Misc. Rep. 567, 133 N. Y. Supp. 717; *Postal Telegraph Cable Co. v. Robertson*, 36 Misc. Rep. 785, 74 N. Y. Supp. 876.

"The same rule applies to the provision of the contract that the damages shall be limited to an amount not exceeding 50 times the sum received for sending the telegram, unless specially valued. Public policy requires that the company shall not limit its liability by such a clause, where it has been guilty of gross negligence."

The same rule was followed in *United States Telegraph Co. v. Wenger*, 55 Penn. St. 262, 93 Am. Dec. 751, where the Court held:

"Telegraph company is guilty of gross negligence, and is therefore liable to the sender of the message for such damages as he sustained in consequence thereof, where a prepaid message, sent from one place to another over the company's line, did not get beyond an intermediate point, and no reason was given by the company for its failure to transmit the message to its destination."

In *Wann v. Western Union Telegraph Co.*, 37 Mo. 472, 90 Am. Dec. 395, the Court held:

“Telegraph companies may specially limit their liabilities, but will not be protected from the consequence of gross negligence.”

IV.

The next assignment of error relates to the ruling of the Court that the evidence does not show that plaintiff suffered any damage by defendant's failure to send the telegram, since he might not have accepted the offer of \$90.00 per share for his stock and might not have been able to have delivered his stock to Miller.

This is a question which was not raised by the pleadings in the action and was not the subject of a special defense. These special defenses were confined to the printed conditions on the telegraph blank, which we have discussed above, and the remainder of the answer is confined to denials and admissions of the allegations of the complaint. The only allegation of the complaint relating to this point is numbered XII (Tr. p. 12), and the denial thereof is found on page 20. The question, as it is stated and decided by the Court below, was therefore not an issue in the case. It was not set up in the answer that plaintiff was not in a position to deliver his stock to Miller, consequently no burden was thrown upon defendant to prove this fact. The only reference to this matter was in the cross-examination of

plaintiff (Tr. p. 83), where he stated that his bank stock was in the Security Bank at Oakland, as collateral for a loan. Upon re-direct examination he testified that this bank stock was available to him to sell at that time and that he was in a position to deliver the stock at any time. These statements are reasonable and there is no evidence to the contrary, and in the absence of an issue of fact in the pleadings on this point, should be considered as established. If such issue had been raised, plaintiff would have had the opportunity to meet it by additional evidence of the bank officials at Oakland. It is not reasonable to suppose that they would have objected to a sale of this security, as they could have fully protected themselves either by sending the bank stock to a bank in Boise with instructions to deliver it to Miller upon payment of the money to the credit of the Security Bank; or the whole matter could have been arranged by wire, as Miller was willing on November 30th to pay the money over upon being assured that he would get the stock. (Tr. pp. 61-63.)

For the reasons just stated, the further fact testified to, relating to the time it takes a letter from Oakland to Boise (Tr. pp. 83-84), is wholly insufficient to support the finding of the Court that plaintiff could not have gotten his stock to Boise in time to deliver it to Miller.

The Court below applied to this case the rule followed in *Western Union Tel. Co. v. Hall*, 124 U. S. 444, and similar cases, cited on page 42 of the record.

Before discussing this rule we wish to briefly call attention to some of the statements made by the Court below in this connection, on page 41 of the record. The statement that plaintiff was necessarily ignorant of the precise situation is not borne out by the admitted facts, neither is there any evidence to support the statement that there was apparently a crisis in Miller's financial ability.

The record shows that prior to plaintiff's departure for California, which was about the middle of November, 1917, he had received several communications from Miller relating to the bank and to the question of Miller's purchasing his stock or his entering into a merger with the Pacific National. Plaintiff did not wish to enter into any merger but wished to sell his stock. They discussed its value pro and con and didn't arrive at anything, because Miller was not ready just then to buy it, but was going away and would be back at a certain time, when he would be ready to negotiate further and they would have no trouble in agreeing on the price, and Miller would buy plaintiff's stock. Plaintiff then informed Mr. T. J. Jones of these facts and that Miller would be back with the money to buy their stock, and plaintiff wanted Jones to negotiate for him, and for them to sell together. Plaintiff then told Miller that Jones would negotiate for him, and left for California. (Tr. pp. 72-73.)

It would appear that plaintiff was fully informed as to the facts, and was anxious to sell his stock. As

to Miller's financial ability to make the deal, there can be no question. On November 30th, the date the telegram was sent, when he was willing to put up the money, he had over \$84,000.00 in the Idaho National alone, and never had less than \$30,000.00 there up to the close of business on December 4th following. What other resources he had is not shown, as it was unnecessary. Moreover, on the other hand, on page 36, the Court found as follows:

"I further find that Miller desired and was able to buy the stock at \$90.00 per share, and that the telegram is to be construed as advising plaintiff of an offer of \$90.00, and, had it been delivered, such is the meaning it would have conveyed to him."

It is our contention that the rule announced in the Hall case and the other cases cited does not apply to this case.

That rule is to the effect that remote and speculative damages, which could not have been reasonably within the contemplation of the parties to a contract, cannot be recovered. In the Hall case the message read: "Buy ten thousand if you think it safe. Wire me." This referred to barrels of petroleum, the market price of which the day the message was sent and should have been delivered was \$1.17 per barrel. The message was delayed and when received the next day the price had advanced to \$1.35 per barrel. The weakness of plaintiff's case consisted in the fact that there was no evidence in the record to show

that he wished to buy the petroleum to sell the next day or to sell at any future time. Naturally he might not have sold the next day, but might have waited for a further advance, and perhaps made no profits. The possible profits were altogether too remote and speculative. The cases cited all involve possible profit on future sales, but if the facts had shown that the purchase was to be made for the express purpose of selling on the following day, the measure of damages would have been the difference in price. Here, as found by the Court, the message constituted an offer to buy plaintiff's stock at \$90.00 per share, which if received would have been at once accepted by plaintiff by wire. Before plaintiff learned of the offer, the bank went into liquidation and the stock became valueless and has so remained ever since. (Testimony of receiver and former cashier, p. 93.) Here the measure of damages is not remote or speculative, but amounts to \$4,500.00, the price plaintiff would have received for his stock. In the Hall cases the Court recognizes this rule, and the distinction is clearly pointed out. It is also clearly pointed out in *Kerns & Lorton v. Western Union Tel Co.*, 174 Mo. App. 438; 160 S. W. 556-557, where the telegram was to buy a certain quantity of potatoes, but nothing said about resale. The Court said:

“Here there was sufficient evidence outside of the terms of the message itself to uphold a finding by the Court that these potatoes were to be bought by plaintiff for resale on their arrival

at Kirksville. It was shown that they had contracted a sale of one-half of the entire lot at \$1.10 per bushel. In such circumstances we think loss of profits is made sufficiently certain and the judgment can be upheld on that ground; the case, we think, is brought within the exception noted by Justice Matthews in *Western Union v. Hall*, *supra*, at the close of the opinion, and in *Western Union v. Fellner*, 58 Ark. 29, 22 S. W. 917, 41 Am. St. Rep. 81; *Jones on Telegraph & Telephone Companies*, Pars. 546-549, wherein it is stated that, if the purchase intended was for immediate resale at a profit which was shown could have been made, such profit was a proper measure of damage."

The distinction is also clearly pointed out in *Cincinnati Gas Co. v. Western Siemens Co.*, 152 U. S. 200-206, where plaintiff failed to prove that it could have effected a resale of the goods at a profit. After stating the rule, the Court proceeded:

"But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into. *United States v. Behan*, 110 U. S. 338, 345, 346, 347; *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 454, 456; *Philadelphia, Wilmington & Baltimore Railroad Co. v. Howard*, 13 How. 307."

Obviously the case at bar is not a case involving loss of profits.

It comes within the principle that where a direct offer to purchase is made, which it is shown from the evidence and surrounding circumstances would have been accepted, the measure of damages for failure to deliver the telegram is the actual damages incurred by the loss of the sale. Failure to transmit the message prevented an actual sale. The evidence of this is undisputed. It was not merely speculative and remote as in the cases cited by the Court below.

The rule stated by the Supreme Court of Iowa in *Herron v. Western Union Tel. Co.*, 90 Iowa 129, 57 N. W. 696, is, we submit, the rule applicable to this case. There one Cassidy, after looking at a horse called Mark, owned by plaintiff, made plaintiff's brother an offer to buy this horse, which had no value except for breeding purposes, and requested the brother to telegraph the offer to plaintiff. Accordingly the brother went to defendant's office in Warren, Michigan, and delivered to defendant a night letter reading as follows:

"Warren, March 31, 1890.

"To C. C. Herron, Clarksville, Iowa.

"Have traded with George Cassidy for Mark, three horses, 1, 2, 3, two hundred, balance fifty dollars young cattle.

"B. B. HERRON."

The evidence showed this offer was to be withdrawn on Wednesday, April 2nd, if not accepted on

or before that day; that B. B. Herron had no authority to accept the offer or sell the horse. The message was not delivered to plaintiff until after the offer was withdrawn. The plaintiff some time after this sold the horse for the best price he could obtain, which was \$50.00 in trade. The Court held:

“Where the dispatch contains an offer for addressee’s horse and the receiving agent knows the horse and knows that the dispatch relates to a trade for him and it requires an answer, the company is charged with notice of the importance of the dispatch.

“Where plaintiff’s sale of his horse failed because of the delay, and the horse had no regular market value in the neighborhood, and plaintiff has since disposed of him for the best price by reasonable effort attainable, plaintiff may recover the difference between the dispatch’s offer and the price realized, with cost of keep and interest.”

In the opinion on page 698, the Court said:

“The value of the property Cassidy offered for the horse was \$250; hence plaintiff sold him for \$200 less than the amount of Cassidy’s offer. It was necessary for plaintiff to pay the expense of keeping the horse from the 2d day of April until he was sold, and the evidence sustains the allowance, if any, made by the jury for that purpose. The loss in price, and the expense of keeping the horse, with interest, represented actual damages which the plaintiff sustained by not accepting the offer of Cassidy; and it is the policy of the law to permit a person injured by the wrong of another to recover the amount of his loss. Where the loss results from a failure

to sell the property for which there is no market value, its actual value may be ascertained by means of the best evidence of which the case admits. 3 Suth. Dam. 476; 1 Sedg. Dam. Par. 250; Wood, Mayne, Dam. Par. 22; White v. Cattle Co. (Tex. Sup.), 12 S. W. 867. We conclude that the measure of damages adopted by the Court as applied to the facts in this case was not erroneous. The jury were authorized to find that Cassidy would have taken the horse according to his offer had it been accepted, and the verdict is sustained by the evidence."

The same rule is applied in

Hoyt v. Western Union Tel. Co., 85 Ark. 473, 108 S. W. 1056, and in

Wallingford v. Western Union Tel. Co., 53 S. C. 410; 31 S. E. 275; s. c. 60, S. C. 201, 38 S. E. 443, which was a case where plaintiff lost the sale of a car load of mules because the telegram containing the offer to him was delayed in delivery for a week; and consequently he lost the sale, was forced to keep them for several months at great expense and was forced to sell them at the end of that time for a certain sum which was less than the offer. The Court held that the telegraph company was liable for the difference in price and the other expenses incurred by plaintiff since the date of the offer. The Court thus stated the rule in the first citation of the case:

"It is not, and could not be, questioned that a telegraph company is liable for damages that are the natural and proximate result of its neglect to seasonably deliver a message received by it for transmission and delivery. The question

here is whether the damages as alleged in the complaint are of the kind named. Damages are a natural result when they are such as usually follow in the ordinary course of things, and they are proximate when they result directly, not remotely, from the alleged cause. Such damages are recoverable because they are supposed to be within the contemplation of the parties when they contract. In this case the loss of the sale of the mules on the terms named was the direct and natural result of the failure to deliver the message, as it is admitted by the demurrer that such sale would have been consummated if the message had been delivered in time."

And the Court in support of the rule cites:

Sitton v. MacDonald, 25 S. C. 71; Telegraph Co. v. James (Ga.), 16 S. E. 83; Squire v. Telegraph Co., 98 Mass. 232; Manville v. Telegraph Co., 37 Iowa 214; True v. Telegraph Co., 60 Me. 9; 25 Am. & Eng. Encyc. Law 848.

Telegraph Co. v. MacKenzie, 31 Tex Civ. App. 178, 81 S. W. 581, is in point and the conclusions of law stated on page 583 apply to this case and recognize the rule for which we contend.

See also Parks v. Alta California Tel. Co., 13 Cal. 422, which has frequently been followed by other Courts, where the same rule is announced. The gross neglect in failing to promptly deliver a telegram in that case caused plaintiff to lose a priority of attachment against a firm which afterwards became insolvent, and plaintiff was unable to collect his claim.

The Court said it was proper to show by evidence that if the message had been delivered the attachment would have been seasonably levied and plaintiff's claim secured.

These cases controvert the proposition made by the learned trial Court, that there is no way to determine whether plaintiff would have accepted the offer. There is every reason, in addition to his own testimony, to show that any reasonable man under the circumstances would have accepted it. He knew the condition of the bank, the merger proposed by Miller which he did not wish to go into, the chances of liquidation, and indicated his desire to sell before going to California.

A large number of the cases are collected in the note to *Western Union Tel. Co. v. Caldwell* (Ky.), 12 L. R. A. (N. S.) 748, showing that the established rule of the American Courts is that a recovery may be had where the telegraph company is guilty of negligence, although the damages are contingent upon possible action by the sendee, where the evidence shows that such action would have been taken.

In the case of

Larsen v. Postal Tel. Co., 150 Iowa, 748, 130 N. W. 813 (*supra*), the telegram was delivered to the company in May, 1906, to be sent to plaintiff. It was never delivered to him. It was from a government official and read: "Will you accept appointment carpenter \$720 per annum, Winnebago agency, Nebraska? Wire answer." It was shown by evi-

dence that this, under the practice in such matters, was equivalent to a tender of appointment. The Court held:

“Damages for the entire failure to deliver to plaintiff, the addressee, a telegram inquiring if he would accept an appointment to a government position are not so remote and speculative as to offer no grounds for recovery, where the plaintiff testifies that, had he received the message, he would have accepted the position.”

In the Nichols case, 159 Fed. 647 (*supra*), decided by this Court, the damages were contingent upon the action of the addressee in adding the 5 per cent to the bid as directed by the sender, and also upon whether the bid for the increased amount would have been accepted by the government officials. This was shown by their testimony. The Court said:

“We are also of opinion that the damages sued for, and which the defendants in error recovered in the Court below, were not speculative or remote, as they covered only the 5 per cent desired by the defendants in error to be added to their bid, and which the officers of the government having in charge the work in question testified would have been added, had the telegram been delivered prior to the opening of the bids, at noon of the 13th of June, 1903.”

So also in the Swan case, 129 Fed. 323 (*supra*), where the telegram advised the addressee of the discovery of rich ore in the Mohawk and that there would be a ten to twenty dollar quick rise, the Court, on page 323, said:

“On the question of damages we have encountered no such difficulty as seems to have been experienced by the Court below in finding a proper measure of damages for the case. If the plaintiff was entitled to recover even nominal damages, that would be better than to give a judgment for costs against him. The proper measure of damages is what the plaintiff lost through the negligence of the defendant, which was the difference between what he had to pay for the stock on the morning of May 2d and what it would have cost him in the forenoon of May 1st, when he should have received the dispatch, or notice that it could not be sent.”

It would seem unnecessary to further lengthen this brief by a citation of additional authorities to show that the rule relating to speculative and remote profits or damages does not apply to this case, and that the Court should have held that plaintiff was damaged in the sum of \$4,500.00 by reason of defendant's gross negligence.

V.

The remaining assignment of error relates to the entering of judgment against plaintiff in favor of defendant for \$42.45 costs. (Tr. 43.)

It seems to us that under any theory of the case the Court should not have entered this judgment. Under condition No. 1 of the telegraph blank, plaintiff was at least entitled to judgment for the amount paid for sending the telegram, and under condition No. 2 (Tr. 100), he was entitled to judgment for \$50.00

and his costs. This matter was called to the Court's attention on the motion for new trial (Tr. 115-16) and is expressly so held in the quotation in the Swan case (*supra*), 129 Fed. 323.

For the foregoing reasons we respectfully submit that the judgment should be reversed with directions to enter judgment in favor of plaintiff for \$4,500.00 with interest from December 1, 1917, at the legal rate, and for costs as prayed for in the complaint.

VI.

The question may be raised by defendant on this appeal as to the refusal of the court to sustain defendant's motion to strike the bill of exceptions from the record. While we contend that this ruling of the Court is not before this Court for review, since defendant has not appealed, we will refer the Court to the authorities cited to the Court below and which sustain his action.

In this case the order extending the time for filing plaintiff's proposed bill of exceptions was not made within the 10 days allowed by the rules, but was made a few days later on a day of the same term, after the motion for new trial had been overruled. This was held to be within the power of the Trial Court in

- Hunnicutt v. Peyton, 102 U. S. 333, 335;
Southern Pac. Co. v. Johnson, 69 Fed. 559,
561;

Russo-Chinese Bank v. National Bank of
of Commerce, 187 Fed. 80, 86, both de-
cided by this Court.

United States v. Waite, 193 Fed. 258.

Cases to the same effect are numerous in other circuits, but we think the above are sufficient without a further citation of authorities. In this case, plaintiff filed a motion for a new trial within the 30 days allowed by the rules after entry of judgment, which motion was argued before the Court and overruled. If a new trial had been granted, the bill of exceptions would have been unnecessary. Plaintiff's counsel at the same time applied for the order extending the time fixed by the rules within which to file his bill of exceptions, and this motion was allowed by the Court at the time the motion for new trial was overruled, and on a day of the same term at which the case was tried. The Court still had jurisdiction over the case, and we think it was clearly within the power of the Court under the authorities cited, to grant the extension. The Court allowed 20 days, and the bill of exceptions was filed and served within this time.

Respectfully submitted,

RICHARD H. JOHNSON,
Attorney for Plaintiff in Error.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

J. A. CZIZEK,

Plaintiff in Error.

VS.

WESTERN UNION TELEGRAPH COMPANY, a
Corporation,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

*Upon Writ of Error to the United States District
Court for the District of Idaho, Southern Division*

BEVERLY L. HODGHEAD,
Residence: San Francisco, California.

RICHARDS & HAGA,

Residence: Boise, Idaho.

Attorneys for Defendant in Error.

FRANCIS R. STARK, New York,
Of Counsel.

FILED

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No. 3543

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STATEMENT OF THE CASE

This action was brought in the District Court of Ada County, Idaho, to recover Four Thousand Five Hundred (\$4,500.00) Dollars damages alleged to have resulted from defendant's failure to deliver a telegram. It was thereupon removed to the United States District Court for the District of Idaho, on the ground that plaintiff was a citizen of Idaho and defendant a New York corporation. Plaintiff in error moved to remand, alleging that he was a citizen

of the State of California, and after a hearing the District Court, on October 10th, 1919, denied the motion to remand (Tr. pp. 54-55). The order provided that plaintiff be allowed an exception to the ruling, but no bill of exceptions covering such ruling was prepared or settled during that term of Court, nor any order sought or obtained extending the time. The succeeding term of the Federal Court began on February 9th, 1920, and during such term the case came on for trial without a jury, pursuant to a written stipulation of the parties (Tr. p. 55). On April 28th, 1920, the Court rendered a decision (Tr. pp. 34-43), and on May 8, 1920, judgment was entered in favor of defendant in error reciting that the Court being fully advised in the premises "finds, concludes and decides in favor of the defendant" (Tr. p. 43).

Notice of the entry of the decision and judgment and a copy of the same was served on counsel for plaintiff in error on May 8th, 1920. Under Rule 76 of the Idaho District (Tr. pp. 120-122), the time for preparing a bill of exceptions to the ruling on the motion to remand expired October 20th, 1919, and the term at which such ruling was made expired at least on February 7, 1920, while the time for preparing a bill of exceptions covering the trial and decision expired May 18, 1920. Plaintiff's motion for new trial, made in accordance with Rule 75 of the Idaho District (Tr. p. 112), and filed on June 5, 1920, came on for hearing on June 17, 1920, "and thereupon for the first time counsel for the plaintiff moved the Court for an extension of time of twenty

days, or until July 8, 1920, within which to serve and file plaintiff's bill of exceptions" (Tr. p. 116). The bill of exceptions recites (Tr. p. 116) that the Court considered the fact of the pendency of the motion for new trial and allowed the plaintiff's motion for an extension of twenty days in which to file his bill of exceptions, at the same time denying the motion for new trial (Tr. p. 117). The proposed bill of exceptions was served and filed on July 2, 1920 (Tr. p. 117) and on July 12, 1920, defendant in error served and filed a motion to strike such proposed bill of exceptions (Tr. pp. 117-120). This motion to strike was sustained "to the extent of striking that portion of the bill of exceptions relating to the motion to remand, on the ground that a bill of exceptions was not prepared and served within the ten days allowed by the rules after the order denying the motion was made, or during the term of Court at which the order denying the motion to remand was made" (Tr. p. 120), and an exception was allowed to such ruling. After certain amendments and corrections had been made, the bill of exceptions was thereupon settled and allowed, and as appears from the transcript it still contained the portion ordered stricken by the Court.

There are no special findings in the record, and no request was made for special findings, and the only finding is the general finding in defendant's favor contained in the judgment which we have quoted above. Under the rule of practice established in this Court and the other Federal Appellate Courts,

we do not think the question of the sufficiency of the evidence is before the Court in the absence of any special findings. And we will, therefore, outline the facts briefly in order that the questions of law raised by rulings at the trial may be considered. The complaint sets forth a telegram written on one of the company's blanks, delivered by one T. J. Jones to defendant's local office in Boise, Idaho, addressed to plaintiff at Oakland, California, readings as follows:

"J. A. CZIZEK,

"5767 Shafter Avenue,

"Oakland, Calif.

"Miller advises Idaho National sold to Pacific offers me ninety dollars per share, otherwise wait year and chances of liquidation says if fails to get two-thirds stock liquidation will follow Will you take ninety dollars per share for yours? I am inclined to accept offer for mine.

Answer.

"T. J. JONES."

(Tr. p. 9.)

It is alleged that this telegram was never transmitted and never received by plaintiff; that at the time the said Miller was ready, willing and able to buy plaintiff's stock at the price named; that the plaintiff did not learn of the sending of the telegram until February, 1918, and that at that time the bank stock in question had no value and became a total loss to plaintiff.

As special defenses in its answer defendant in error pleads that the message in question was an interstate message subject to the jurisdiction and

control of the Interstate Commerce Commission as to rules and regulations, and (1) that under the contract of transmission approved by such Commission a claim in writing must be presented within sixty days after the telegram was filed with the company, (2) under such approved contract this telegram was sent as an unrepeatd message and defendant's liability thereon was limited to the amount received for sending the message, and (3) under such approved contract the message was not specially valued and therefore the liability could in no event exceed fifty dollars.

Defendant in error has filed in this court a motion to strike the alleged bill of exceptions in its entirety on the ground that it was not served or presented for settlement within the time allowed by the rules of the United States District Court for the District of Idaho, and that the alleged extension of time was not given until the Court had lost power over the cause by the failure to get an extension within the period limited by the rules. The principal questions presented on this record are accordingly:

1. The sufficiency of the alleged bill of exceptions.

2. If the motion to strike is denied whether this Court will consider the evidence in the absence of any special findings made or requested to be made by the Trial Court.

3. If the matter is properly presented for review, whether the Trial Court erred in denying the motion to remand, and if so, whether plaintiff in error did not waive the objection by going to trial.

4. If the merits of the case are before this Court for determination, whether or not the Court erred in entering judgment for defendant in error.

BRIEF OF THE ARGUMENT

No exceptions to rulings of the Trial Court can be considered on writ of error, unless embodied in a bill of exceptions, duly presented and allowed by the Trial Court.

Mich. Insurance Bank vs. Eldred, 143 U. S. 293, 36 L. Ed. 162.

Simkins Federal Suit at Law, page 98.

Yellow Poplar Lumber Co. vs. Chapman, 20 C. C. A. 507, 74 Fed. 444.

Buessel vs. U. S., 170 C. C. A. 105, 258 Fed. 811, 818.

Smith vs. U. S., 261 Fed. 605.

A bill of exceptions served and presented after the term has expired at which the ruling excepted to was made, without an order or rule of the Court authorizing such practice, is insufficient, and the Trial Court properly ordered that portion of the bill of exceptions relating to the motion to remand stricken from the transcript.

Rule 76 Idaho District (Tr. page 120).

Simkins Fed. Suit at Law, page 98.

Mich. Ins. Bank vs. Eldred, *supra*.

U. S. vs. Jones, 149 U. S. 262, 37 L. Ed. 726.

Jennings vs. Philadelphia, etc. Railroad Company, 218 U. S. 255, 54 L. Ed. 1031.

The bill of exceptions was not settled within the time limited by rule 76 of the Idaho District and no order extending the time was made until long after the period had expired, hence the entire bill of exceptions should be stricken from the transcript and the judgment affirmed.

Simkins Fed. Suit at Law, page 98.

Oxford and Coast Line Railroad Company vs.

Union Bank, 82 C. C. A. 409, 153 Fed. 723.

U. S. vs. Jones, *supra*.

Jennings vs. Philadelphia, etc. Co., *supra*.

Dalton vs. Hazelet, 105 C. C. A. 99, 182 Fed. 561.

Yellow Poplar Lumber Co. vs. Chapman, 20

C. C. A. 507, 74 Fed. 444.

Wyss Thalman vs. Maryland Casualty Co.,

113 C. C. A. 383 (3d Circuit) 193 Fed. 53.

Rupert vs. United States, 104 C. C. A. 255

(8th Circuit) 181 Fed. 87.

Franklin County vs. Furry, 75 C. C. A. 465

(7th Circuit) 144 Fed. 663.

Adams vs. Shirk, 58 C. C. A. 159 (7th Cir-

cuit) 121 Fed. 823.

Reliable Incubator Co. vs. Stahl, 32 C. C. A.

522 (7th Circuit) 102 Fed. 590.

Miller vs. Morgan, 14 C. C. A. 312 (5th Cir-

cuit) 67 Fed. 82.

M. K. & T. R. R. Co. vs. Russell, 9 C. C. A.

108 (8th Circuit) 60 Fed. 501.

United States vs. Thibodeaux, 146 C. C. A.

283 (5th Circuit), 232 Fed. 91.

Mound Coal Co. vs. Jeffrey Mfg. Co., 147
C. C. A. 587 (4th Circuit) 233 Fed. 913,
917.

Scaife vs. Western etc. Land Co., 30 C. C. A.
661 (4th Circuit) 87 Fed. 310.

Mahoning Valley Ry. Co. vs. O'Hara, 116
C. C. A. 495 (6th Circuit) 196 Fed. 945.

Reader vs. Haggin, 88 C. C. A. 91 (2nd Cir-
cuit) 160 Fed. 909.

Robertson vs. Cockrell (C. C. A. 5th Circuit)
209 Fed. 843.

City of Harper vs. Daniels, 129 C. C. A. 242
(8th Circuit) 211 Fed. 57.

Morse vs. Anderson, 150 U. S. 156, 37 L. Ed.
1037.

The act of February 26, 1919, amending Section 269 of the Judicial Code did not do away with the necessity for a bill of exceptions because without a proper bill of exceptions neither the evidence nor the rulings at the trial are part of the "record before the Court".

Buessel vs. United States, 170 C. C. A. 105,
258 Fed. 811, 818.

Smith vs. United States, 261 Fed. 605.

No good cause is shown for the delay in serving the bill of exceptions, and the filing of petition for new trial after the time for bill of exceptions had expired cannot extend the time for serving such bill.

Russo-Chinese Bank vs. National Bank of
Commerce, 109 C. C. A. 398, 187 Fed. 80.

S. P. R. R. Co. vs. Johnston, 16 C. C. A. 317,
69 Fed. 559.

Idaho Compiled Statutes, Sec. 6882.

Swartz vs. Davis, 9 Ida. 238, 74 Pac. 800.

Sandstrom vs. Smith, 11 Ida. 779, 84 Pac.
1060.

The Court rules in relation to bill of exceptions
should be observed.

Oxford and Coast Line Ry. Co., vs. Union
Bank, 82 C. C. A. 609, 153 Fed. 723.

Mich. Ins. Bank vs. Eldred, 143 U. S. 298,
36 L. Ed. 162.

When a law case is tried by the Court without
a jury and there are no special findings, the Appel-
late Court will not determine the sufficiency of the
evidence and the opinion of the Trial Court cannot
be resorted to for the purpose of supplying special
findings.

British Queen Mining Co. vs. Baker Silver
Mining Co., 139 U. S. 199, 35 L. Ed. 147.

Dickinson vs. Planters Bank, 83 U. S. 250,
21 L. Ed. 278.

Northern I. & M. Power Co. vs. A. L. Jordan
Lumber Co., 262 Fed. 765.

Pennsylvania Casualty Co. vs. Whiteway, 210
Fed. 782, 127 C. C. A. 332.

Societe Nouvelle D'Armement vs. Barnaby,
246 Fed. 68, 158 C. C. A. 294.

Dunsmuir vs. Scott, 217 Fed. 200-202, 133
C. C. A. 794.

H. F. Dangberg L. & Ls. Co. vs. Day, 247
Fed. 477-478, 159 C. C. A. 531.

Maryland Casualty Co. vs. Orchard L. & T.
Co., 240 Fed. 364, 153 C. C. A. 290.

National Surety Co. vs. Lincoln Co. Mont.
238 Fed. 705-708.

Sierra L. & Ls. Co. vs. Desert P. & M. Co.,
229 Fed. 982, 144 C. C. A. 264.

Pabst Brewing Co. vs. E. Clemens Horst Co.,
264 Fed. 909, C. C. A. (9th Circuit).

The motion to remand was properly denied on the facts and the Trial Court's finding on conflicting evidence will not be reversed.

Schoenwald vs. Bishop, 244 Fed. 715, 718.

Even if plaintiff was a citizen of California, the Court has jurisdiction because the requisite diversity of citizenship existed and the privilege of objecting to the venue was a privilege personal to the defendant.

L. & N. Railway Co. vs. Western Union Tel.
Co., 218 Fed. 91.

Hohenberg vs. Mobile Liners, 245 Fed. 169.

Bogue vs. Atchison etc. Ry. Co., 193 Fed. 728.

Bagenas vs. Southern Pac. Co., 180 Fed. 887.

Keating vs. Pennsylvania Co., 245 Fed. 155.

Park Square Automobile Co. vs. American
Locomotive Co., 222 Fed. 979.

Doherty vs. Smith, 233 Fed. 132.

Earles vs. Germain Co., 265 Fed. 718.

Any objection plaintiff might have had on the ground that the suit was not pending in the proper district was waived when he went to trial without objection.

Re Moore, 209 U. S. 490, 52 L. Ed. 904.

Western Loan & Savings Co. vs. Butte Co.,
210 U. S. 368, 52 L. Ed. 1101.

Kreigh vs. Westinghouse Co., 214 U. S. 506,
53 L. Ed. 1061.

The pleadings and evidence show that the sender of the telegram was plaintiff's agent and plaintiff is accordingly bound by the provisions of the contract of transmission.

Coit vs. Western Union Tel. Co., 130 Cal. 657,
63 Pac. 83.

Halsted vs. Postal Tel. Co., 193 New York
293, 19 L. R. A. (N. S.) 1021.

New York Fruit Market vs. Western Union
Tel. Co., 190 App. Div. (N. Y.) 160.

Dant vs. Western Union Tel. Co., 42 App.
Cas. (D. C.) 398.

Anniston Cordage Co. vs. Western Union Tel.
Co., 161 Ala. 216, 30 L. R. A. (N. S.) 1116.

Even though plaintiff brings his action in tort on the theory of a legal duty, he is bound by the terms of the contract of transmission, for without such contract there would be no legal duty.

McGehee vs. Western Union Tel. Co., Ala. 57
So. 205.

- Gardner vs. Western Union Tel. Co., 145
C. C. A. 399, 231 Fed. 405.
- Western U. Tel. Co. vs. Culberson, 79 Tex.
65, 19 S. W. 219.
- Stone vs. Postal Tel. etc. Co. (R. I.) 76 Atl.
762, 29 L. R. A. (N. S.) 795.
- Western U. Tel. Co. vs. Bank of Spencer, 53
Okla. 398, 156 Pac. 1175.
- Bailey vs. Western U. Tel. Co., 97 Kan. 619,
156 Pac. 716.
- Western U. Tel. Co. vs. Schade, (Ky.) 192
S. W. 924.
- Western U. Tel. Co. vs. Lee, (Ky.) 192 S. W.
70.
- Meadows vs. Postal Tel. etc. Co., (N. C.) 91
S. E. 1109.
- Western U. Tel. Co. vs. Orr, (Okla.) 158 Pac.
1139.
- Poor vs. Western U. Tel. Co., 196 Mo. App.
557, 196 S. W. 28.
- Jacobs vs. Western U. Tel. Co., 196 Mo. App.
300, 196 S. W. 31.
- Klotz vs. Western U. Tel. Co., 175 N. W.
825, and
- Postal Tel. Cable Co. vs. Warren Godwin Co.,
251 U. S. 27, 64 L. Ed., where the Gardner
case is expressly approved.

The legal duty of a telegraph company in relation to interstate messages is determined by the Interstate Commerce Act and the rules and regulations

of the company on file with the Interstate Commerce Commission and approved by it.

Act of June 18, 1910, 36 St. L. 539-554, 4
F. S. A. (Ind. Ed.) page 337, Secs 1a
and 1c.

Postal Telegraph Cable Co. vs. Warren-God-
win Lumber Co., 251 U.S. 27, 64 L. Ed.....

Western Union Tel. Co. vs. Boegli, 251 U. S.
315, 64 L. Ed.....

Gardner vs. Western Union Tel. Co., 145
C. C. A. 399, 231 Fed. 405.

The Court was without jurisdiction to determine that any of the provisions of the contract for the transmission of this telegram were unreasonable, as that matter must be determined by the Interstate Commerce Commission and the Commission has held these regulations to be reasonable, a determination not subject to collateral attack.

United States vs. M. & M. Traffic Association,
242 U. S. 178, 61 L. Ed. 233, 239.

Williams vs. Western Union Tel. Co., 203
Fed. 140, 145.

Gardner vs. Western Union Tel. Co., *supra*.
Western Union Tel. Co. vs. Bank of Spencer,
53 Okla. 298, 156 Pac. 1175.

Potlatch Lumber Co. vs. Spokane Ry. Co., 157
Fed. 288.

Great Northern Railroad Co. vs. Kalispell
Lumber Co., 91 C. C. A. 63, 165 Fed. 25.

Erie Railroad Co. vs. Stone, 244 U. S. 332,
61 L. Ed. 1173.

The Interstate Commerce Commission has upheld the reasonableness of the provisions on the telegraph blank in question and such decision has been approved by the Supreme Court of the United States.

Cultra vs. Western Union Tel. Co., 44 I. C. R. 670.

Postal Tel. Cable Co. vs. Warren-Godwin Lumber Co., 251 U. S. 27.

The clause requiring written notice of the claim within sixty days from the time the telegram is filed for transmission is reasonable and is a complete defense in this case.

Gardner vs. Western Union Tel. Co., 145 C. C. A. 399, 231 Fed. 405.

Postal Tel. Cable Co. vs. Warren-Godwin Lumber Co., 251 U. S. 27.

Whitehill vs. Western U. Tel. Co., 136 Fed. 499.

Manier vs. Western U. Tel. Co., 94 Tenn. 442, 29 S. W. 732.

Western U. Tel. Co. vs. Bank of Spencer, 53 Okla. 398, 156 Pac. 1175.

Western U. Tel. Co. vs. Kaufman (Okla.), 162 Pac. 708.

Gooch vs. Oregon Short L. Ry. Co. (C. C. A. 9th Circuit), 264 Fed. 664.

Georgia, Florida etc. Ry. Co. vs. Blish Milling Co., 241 U. S. 90, 60 L. Ed. 948.

St. Louis & Iron Mountain Ry. Co. vs. Starbird, 243 U. S. 592, 61 L. Ed. 917.

Erie R. R. Co. vs. Stone, 244 U. S. 332, 61 L. Ed. 1173.

Southern Pacific Co. vs. Stewart, 244 U. S. 446, 63 L. Ed. 350.

The most that plaintiff in error could claim in this case was the right to give written notice within sixty days from discovery and this he failed to do.

Postal Tel. etc. Co. vs. Nichols, 89 C. C. A. 585, 159 Fed. 643.

Western U. Tel. Co. vs. Lee, 174 Ky. 210, 192 S. W. 70.

No waiver of the sixty-day clause is shown by the evidence and it would seem under the authorities that this provision could not be waived.

Gooch vs. Oregon Short L. Ry. Co., 264 Fed. 664.

Kerns vs. Western U. Tel. Co. (Mo.), 198 S. W. 1132.

Georgia, Fla., etc. Ry. Co. vs. Blish Milling Co., 241 U. S. 90, 60 L. Ed. 948.

So. Pac. Co. vs. Stewart, 244 U. S. 446, 63 L. Ed. 350.

Upon this question decisions of the State Courts and the lower Federal Courts on causes of action arising prior to 1910 and the insurance cases are not authoritative.

Postal Tel. Co. vs. Warren-Godwin Lumber Co., 251 U. S. 27.

The unrepeated message clause is not one exempting the company from liability for negligence, but is merely a reasonable condition appropriately adjusting the charge for the service to the duty and responsibility exacted for its performance, and under such unrepeated clause plaintiffs recovery would at the most be limited to the amount paid by his agent for sending the message.

Primrose vs. Western Union Telegraph Co.,
154 U. S. 1, 38 L. Ed. 883.

Postal Tel. Cable Co. vs. Warren-Godwin
Lumber Co., 251 U. S. 27, 64 L. Ed.

Western U. Co. vs. Bank of Spencer, 53 Okla.
398, 156 Pac. 1165.

Bailey vs. Western U. Tel. Co., 97 Kan. 619,
156 Pac. 716, affirmed on rehearing, 99
Kan. 7, 160 Pac. 985.

Western U. Tel. Co. vs. Lee (Ky.), 192
S. W. 70.

Meadows vs. Postal Tel. Co. (N. C.) 91 S. E.
1009.

Haskell Implement Co. vs. Postal Tel. Co.
(Me.) 96 Atl. 219.

Western U. Tel. Co. vs. Hawkins, 14 Ala.
App. 295, 73 So. 973.

Boyce vs. Western U. Tel. Co. (Va.) 89 S. E.
106.

Western U. Tel. Co. vs. Orr (Okla.) 158 Pac.
1139.

Western U. Tel. Co. vs. Kaufman (Okla.),
162 Pac. 708.

The cases cited on the question of gross negligence in plaintiff's brief must, since the decision of the Supreme Court of the United States in the Warren-Godwin case, be considered as authority only on the special facts there involved.

Cultra vs. Western U. Tel. Co., 44 I. C. R. 670, 675.

Primrose vs. Western U. Tel. Co., 154 U. S. 1, 38 L. Ed. 883.

Postal Tel. Co. vs. Warren-Godwin Lumber Co., 251 U. S. 27.

Hartness vs. Western U. Tel. Co., 99 S. E. (S. C.) 759.

The unrepeatd clause applies to delays in delivery or failure to deliver, as well as to mistakes in transmission.

Gardner vs. Western U. Tel. Co., 145 C. C. A. 399, 231 Fed. 405.

Bailey vs. Western U. Tel. Co., 97 Kan. 619, 156 Pac. 716.

Western U. Tel. Co. vs. Lee, 192 S. W. 70.

Western U. Tel. Co. vs. Hawkins, 14 Ala. App. 295, 73 So. 973.

Western U. Tel. Co. vs. First National Bank, 83 S. E. 424.

Western Union Tel. Co. vs. Orr (Okla.), 158 Pac. 1136.

Western U. Tel. Co. vs. Kaufman (Okla.), 162 Pac. 708.

The clause exempting defendant company from liability for more than fifty dollars unless the telegram was specially valued is a valid defense to that extent and regardless of the character of the negligence involved, the maximum of plaintiff's recovery must be limited to fifty dollars.

Klotz vs. Western U. Tel. Co. (Ia.), 175 N.W. 825.

Western U. Tel. Co. vs. Compton, 114 Ark. 193, 169 S. W. 946.

Jacobs vs. Western U. Tel. Co., 196 Mo. App. 300, 196 S. W. 31.

Postal Tel. Co. vs. Warren-Godwin Lumber Co., 251 U. S. 27.

Western Union Tel. Co. vs. Kaufman (Okla.) 162 Pac. 708.

Cultra vs. Western U. Tel. Co., 44 I. C. R. 670.

Western U. Tel. Co. vs. Schade, 192 S. W. 924.

Bailey vs. Western U. Tel. Co., 97 Kan. 619, 156 Pac. 716.

Hartness vs. Western U. Tel. Co., 99 S. E. 759.

Kerns vs. Western U. Tel. Co. (Mo.), 198 S. W. 1132.

Similar valuation clauses as a basis for making rates by railroads and express companies have been uniformly upheld and the liability limited to the amount stipulated, regardless of the character of the negligence.

Erie Ry. Co. vs. Stone, 244 U. S. 332, 61 L. Ed. 1173.

Adams Express Co. vs. Croninger, 226 U. S. 491, 57 L. Ed. 314.

M. K. & T. Ry. Co. vs. Harriman, 227 U. S. 657, 670, 57 L. Ed. 690.

C. C. C. & St. Louis Ry. Co. vs. Deitlebach, 239 U. S. 588, 60 L. Ed. 453.

Chicago, New Orleans, etc. Co. vs. Rankin, 241 U. S. 919, 60 L. Ed. 1022.

B. & M. R. R. Co. vs. Hooker, 233 U. S. 97, 58 L. Ed. 868.

Plaintiff's testimony as to what he would have done was inadmissible and properly excluded by the Court.

Western U. Tel. Co. vs. Hall, 124 U. S. 44, 31 L. Ed. 479.

Western U. Tel. Co. vs. Ferguson, 54 L. R. A. 846.

Hall vs. Western U. Tel. Co., 51 So. 819, 27 L. R. A. (N. S.) 639.

Kiley vs. Western U. Tel. Co., 39 Hun. 158. Affirmed 109 New York, 231.

Bass vs. Postal Tel. Co., 127 Ga. 423, 53 S. E. 465.

Wilson vs. Western U. Tel. Co., 124 Ga. 131, 52 S. E. 153.

Western U. Tel. Co. vs. Webb, 48 So. 408.

Richmond H. Mills vs. Western U. Tel. Co., 123 Ga. 216, 51 S. E. 290.

Bennett vs. Western U. Tel. Co., 129 Ia. 607, 106 N. W. 13.

Smith vs. Western U. Tel. Co., 83 Ky. 104,
4 Am. St. Rep. 126.

Western Union Tel. Co. vs. Adams Mach. Co.,
92 Miss. 849, 47 So. 412.

Cherokee T. Ex. Co. vs. Western Union Tel.
Co., 143 N. C. 376, 55 S. E. 777.

Harmon vs. Western U. Tel. Co., 65 S. C. 490,
43 S. E. 959.

Beatty L. Co. vs. Western U. Tel. Co., 52
W. Va. 410, 44 S. E. 309.

Fisher vs. Western Union Tel. Co., 119 Wis.
146, 96 N. W. 545.

Western U. Tel. Co. vs. Watson, 94 Ga. 202,
21 S. E. 457.

ARGUMENT

THERE IS NO PROPER BILL OF EXCEPTIONS BEFORE THE COURT.

At the outset of the discussion of the case at bar we are confronted by two questions of practice, the determination of which will decide the extent to which this Court will have to examine the record in order to determine the case. The first of these questions is raised by the motion of defendant in error to strike the alleged bill of exceptions from the transcript for the reason that it was not seasonably filed and if this motion is sustained, it will necessitate an affirmance of the judgment because all the errors assigned by plaintiff arise upon such bill of exceptions (Tr. pp. 124-127), and no error is or can be assigned upon the record proper consisting of the pleadings and the judgment.

The first assignment of error (Tr. p. 124) challenges the correctness of the ruling upon motion to remand, but this question is not properly before this Court, because the learned Trial Judge at the time that he allowed the balance of the bill of exceptions ordered this portion of the bill stricken out (Tr. p. 120). He did, however, allow an exception to such ruling and assignment of error No. 13 attacks such ruling. The present writ of error, however, is to the judgment dated May 8, 1920, while this ruling was made July 16, 1920, and we do not see how plaintiff in error can attack, on a writ of error from the judgment, a ruling made over two months after such judgment was entered. If he had any remedy at all, it was by a petition to this Court for a writ of mandamus to compel the Trial Court to settle the bill of exceptions as presented, or by a writ of error to the ruling excepted to. There can be no question, however, but that the Trial Court was justified in striking this portion from the bill of exceptions. It appears that the motion to remand was denied October 10, 1919, and the bill of exceptions was not served or presented within the ten days allowed by the Court rule, or at that term of Court, and no extension whatever was obtained and no bill of exceptions was prepared or served until July 2, 1920, over eight months after the time for serving the bill had expired.

Rule 76 of the Trial Court provides in part as follows (Tr. pp. 120-121) :

“A bill of exceptions to any ruling may be reduced to writing and settled and signed by the Judge at any time the ruling is made, or at any subsequent time during the trial, if the ruling was made during a trial, or within such time as the Court or Judge may allow by order made at the time of the ruling, or if the ruling was during a trial, by order made at any time during the trial, or within the time hereinafter mentioned, and when so signed shall be filed with the Clerk.

“If not settled and signed as above provided, a bill of exceptions may be settled and signed as follows: *The party desiring the bill shall, within ten days after the ruling was made, or if such ruling was made during a trial, within ten days after the rendition of the verdict, or, if the case was tried without a jury within ten days after written notice of the rendition of the decision, serve upon the adverse party a draft of the proposed bill of exceptions.*” (Our italics.)

The general rule on this question is thus stated in Simkins Federal Suit at Law, page 98.

“The bill must be duly presented to and allowed by the Trial Judge during the term at which the trial was had; or within the time extended by the Trial Judge during the term, or, if there be a rule of the Court or Circuit governing the time for presentation for allowance, it

must be followed, or an extension granted within time allowed by the rule.

* * * * *

“The rules fixing the time for presentation and allowance of a bill of exceptions are directory, and to subserve the ends of justice the Trial Judge may extend the time, provided the exceptions incorporated in the bill were taken during the trial, and when the matters excepted were offered; *and provided, further, the extension was granted* within the time allowed by rule for the presentation and allowance of the bill. The Trial Court cannot extend the time when the application was made, after the time limited by the rule had expired.” (Our italics.)

Numerous authorities are cited in support of this proposition and it is clearly established that a bill of exceptions cannot be settled after the term at which the ruling was made unless the Court in some way retains jurisdiction so to do. The record shows that on June 17, 1920, some eight months after the time for this bill of exceptions expired under Rule 76 and four months after the term at which the ruling was made expired, plaintiff in error for the first time sought an extension of time for his bill of exceptions.

In *Michigan Insurance Bank vs. Eldred*, 143 U. S. 293, 36 L. Ed. 162, at page 163, the Court said:

“By the uniform course of decision, no exceptions to rulings at a trial can be considered

by this Court unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of Court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the Judge and filed with the Clerk during the same term. After the term has expired, without the Court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this Court, all authority of the Court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end."

It is clear, therefore, that even if the action of the Trial Court is subject to review here on this writ directed against the judgment, the Trial Court did not err in striking this portion of the proposed bill of exceptions and accordingly the evidence on the motion to remand is not properly before this Court.

The portion of the bill relating to the rulings at the trial and the evidence presents a slightly different question, because it was allowed by the Trial Court at the term during which the judgment was entered, though not served or presented until long after the time limited by the rule had expired. The judgment was rendered and notice thereof served in accordance with the rule on May 8th, 1920, and

under Rule 76 quoted above, the time for serving the bill expired on May 18, 1920. Under Rule 75 the time in which plaintiff in error might file his petition for new trial did not expire until June 7th, 1920. Accordingly, on June 5, 1920, eighteen days after the time for serving his bill of exceptions had expired, and without obtaining any order extending such time or any stipulation, plaintiff in error served his petition for new trial and on June 17, 1920, thirty days after the time for serving his bill of exceptions had expired, he first asked for an extension and the Court granted twenty days additional time for his bill of exceptions. Within such time the bill of exceptions was served and thereafter it was settled and allowed over defendant's objection. On this state of facts defendant in error has moved to strike the entire bill of exceptions from the record. And we submit that such motion should be sustained and the judgment affirmed. Under the rule as stated by Simkins, which we have quoted above, the order of extension made on June 17, 1920, was inoperative and void because it was not made until after the time fixed by the rule had expired. In *Oxford and Coast Line R. R. Co. vs. Union Bank*, 82 C. C. A. 609 (4th Circuit) 153 Fed. 723, the Court lays down the rule as follows:

“In the absence of a rule to the contrary, a party against whom there is a judgment in an action at law is entitled to prepare and file a bill of exceptions during the term at which the case was tried relating to questions reserved at

the trial. However, in the district in which this case was tried there is a rule of Court which only allows twenty days in which to prepare and file a bill of exceptions. Notwithstanding this rule, the Court had the power to extend the time in which to prepare and file a bill of exceptions, provided it did so within twenty days, but, once the Court permitted the twenty days to expire, then it no longer had the power to extend the time, and the case would stand just as though the term had expired."

The Supreme Court of the United States states the rule clearly in its opinion in *United States vs. Jones*, 149 U. S. 262, 37 L. Ed. 726, which we quote in full:

"Judgment was rendered in this case July 18, the writ of error sued out and allowed July 23, and the Court adjourned for the term July 30, 1889. So far as disclosed by the record the bill of exceptions was not tendered to the judge or signed by him until October 7, 1889, and no order was entered extending the time for its presentation, nor was there any consent of parties thereto, nor any standing rule of Court which authorized such approval. The bill of exceptions was therefore improvidently allowed. *Muller vs. Ehlers*, 91 U. S. 249 (23:319); *Jones vs. Grover & B. Sewing Mach. Co.*, 131 U. S. App. Cl. (24:925); *Michigan Ins. Bank vs. Eldred*, 143 U. S. 293 (36:162).

“As the errors assigned arise upon the bill of exceptions, we are compelled to affirm the judgment, and it is so ordered.”

In *Jennings vs. Philadelphia etc. R. R. Co.*, 218 U. S. 255, 54 L. Ed. 1031, the facts were as follows: The Court of Appeals of the District of Columbia had sustained a motion to strike a bill of exceptions on the ground that it had been settled after the term without a special order extending the time beyond the term. Writ of error was brought and the Court held that the time having expired before the extension, all the proceedings were *coram non judice* and void, and the order of the Court of Appeals was therefore affirmed.

In *Dalton vs. Hazelet*, 105 C. C. A. 99, 182 Fed. 561, and on page 568 this Court states:

“The exceptions were not filed with the clerk until more than six months after the entry of the decree, but the appellants relied upon the order of March 29, allowing the defendants 90 days for preparing and settling exceptions. When the order was made, the time for filing exceptions had long since expired and the Court had no authority to extend the time.”

Other cases sustaining this rule are the following:

Wyss Thalman vs. Maryland Casualty Co.,
113 C. C. A. 383 (3d Circuit), 193 Fed. 53.

Rupert vs. United States, 104 C. C. A. 255
(8th Circuit), 181 Fed. 87.

Franklin County vs. Furry, 75 C. C. A. 465
(7th Circuit), 144 Fed. 663.

Adams vs. Shirk, 58 C. C. A. 159 (7th Circuit), 121 Fed. 823.

Reliable Incubator Co. vs. Stahl, 32 C. C. A. 522 (7th Circuit) 102 Fed. 590.

Miller vs. Morgan, 14 C. C. A. 312 (5th Circuit), 67 Fed. 82.

M. K. & T. R. R. Co. vs. Russell, 9 C. C. A. 108 (8th Circuit), 60 Fed. 501.

United States vs. Thibodeau, 146 C. C. A. 283 (5th Circuit), 232 Fed. 91.

Mound Coal Co. vs. Jeffrey Mfg. Co., 147 C. C. A. 587 (4th Circuit), 233 Fed. 913, 917.

Scaife vs. Western etc. Land Co., 30 C. C. A. 661 (4th Circuit), 87 Fed. 310.

Mahoning Valley Ry. Co. vs. O'Hara, 116 C. C. A. 495 (6th Circuit), 196 Fed. 945.

Reader vs. Haggin, 88 C. C. A. 91 (2nd Circuit) 160 Fed. 909.

Robertson vs. Cockrell (C. C. A. 5th Circuit), 209 Fed. 843.

City of Harper vs. Daniels, 129 C. C. A. 242 (8th Circuit), 211 Fed. 57.

Morse vs. Anderson, 150 U. S. 156, 37 L. Ed. 1037.

In the case of Buessel vs. United States, 170 C. C. A. 105 (2d Circuit), 258 Fed. 811, 818, the Court said:

"The general rule has been that in actions at law evidence introduced, or offered and rejected, at the trial, and rulings thereon, can be

brought before the Appellate Court only by a bill of exceptions."

In *Yellow Poplar Lumber Co. vs. Chapman*, 20 C. C. A. 507 (4th Circuit) 74 Fed. 444 at page 448, the Court states:

"It is now a rule of practice universally followed in the Courts of the United States that an exception to the ruling of a Trial Judge cannot be considered in the Appellate Court, unless it was duly noted during the trial, and preserved in a bill of exceptions, which was presented to and allowed by the Court at the term during which the trial was had, or within a time provided for by an order entered during such term; or where it had been allowed under the standing rules of the Court, or with the consent of the parties or under such circumstances as clearly show that it was the intention of the Court to, and that it did, retain by special order the control of said matter, for the purpose of examining, allowing, and signing the said bill of exceptions."

In *Russo-Chinese Bank vs. National Bank of Commerce*, 109 C. C. A. 398, 187 Fed. 80, this Court holds that in view of the special circumstances the rule might be dispensed with and that inasmuch as the order extending the time recited that it was for good cause shown the Trial Court's action would be accepted. But in the case at bar there is no attempt to show any cause or reason why the Court should extend the time long after the time limited by the rule

had expired. In the case last cited the Court commented on the difference between the state practice and the federal practice, but here the state practice was exactly the same. Section 6882 of the Idaho Compiled Statutes, 1919, which has been on the statute books of Idaho since 1881, provides as follows:

“When a party desires to have exceptions taken at a trial, settled in a bill of exceptions he may within ten days * * * after receiving notice of the entry of the judgment, if the action were tried without a jury, or such further time as the Court in which the action is pending, or the Judge thereof, may allow, prepare a draft of the bill and serve the same or a copy thereof upon the other party.”

The practice in the Idaho Courts has been exactly the same as that of the Federal Courts. See:

Swartz vs. Davis, 9 Ida. 238, 74 Pac. 800.

Sandstrom vs. Smith, 11 Ida. 779, 84 Pac. 1060.

Under these circumstances counsel for plaintiff in error cannot be heard to excuse himself on the ground of the state practice.

The only ground given by the Court for the extension of time is found in bill of exceptions where it is stated:

“The Court considered the fact of the pendency of the motion for new trial and the Court allowed plaintiff’s motion for an extension of twenty days within which to file and serve his proposed bill of exceptions.”

It cannot be assumed, therefore, that the Court had any other reason, and we do not think that the pendency of the motion for new trial can avail plaintiff in error in this case, because such motion was not filed until after the time for the bill of exceptions had expired. In *Southern Pacific Railway Company vs. Johnson*, 16 C. C. A. 317, 69 Fed. 559, where this Court held that the pendency of a motion for new trial extended the time for a bill of exceptions, the motion for new trial was filed before the time for a bill of exceptions had expired under the rule and the Court apparently adopted the view that the pendency of such motion retained the matter in the Court's control, because if the new trial was granted no bill of exceptions would be necessary. The few other cases in which a motion for a new trial was held to extend the time for the bill were also cases where the application was made within the time in which a bill of exceptions could have been prepared or an order extending the time granted. In the case at bar, from May 18, 1920, when the time for the bill of exceptions expired, until June 5, 1920, 18 days later, the Court had entirely lost control over the case, and under the authorities above cited the subsequent filing of petition for new trial and the granting of the order of extension could not aid plaintiff in error because the time had already expired.

In *Oxford and Coast Line Company vs. Union Bank*, 82 C. C. A. 609, 153 Fed. 723, the Circuit Court of Appeals for the Fourth Circuit defined the

duty of counsel in relation to bills of exception at page 728 of the Federal Reporter in the following language:

“While it is not the policy of the Court to dismiss writs of error and cases on appeal on account of slight technicalities, at the same time, the rules of this Court, as well as the rules of the Circuit Court, are plain and easily understood. In this instance the provision of the statute relating to the question at issue is mandatory and must be enforced. It is incumbent upon attorneys who practice in the Federal Courts to observe and strictly follow the rules of practice and procedure in preparing and presenting bills of exceptions.

“In the case of *Michigan Ins. Bank vs. Eldred*, 143 U. S. 298, 12 Sup. Ct. 452, 36 L. Ed. 162, the Court, among other things, said:

“‘The duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of and the exceptions taken to them, belongs to the excepting party, and not to the Court. The Trial Court has only to consider whether the bill tendered by the party is in due time, in legal form, and conformable to the truth; and the duty of the Court of Error is limited to determining the validity of exceptions duly tendered and allowed.’

“It is essential to the orderly procedure of the Courts that attorneys should comply with

the rules relating to the same; otherwise, it would be useless to promulgate rules for the guidance of those who may seek to review the action of the lower Court."

Notwithstanding the rule thus clearly laid down by the authorities, counsel for plaintiff in error at page 16 of his brief, in urging that this Court should consider the portion of the transcript which the Trial Court ordered stricken from the bill of exceptions, makes the following statement:

"It seems to us that regardless of the technical question as to whether it was properly incorporated in the bill of exceptions or not, it may properly be considered by the Court as within the intent and spirit of the amendment of February 26, 1919, to Section 269 of the Judicial Code."

In *Buessel vs. United States, supra*, the Circuit Court of Appeals of the Second Circuit gives a very full discussion of the history and office of a bill of exceptions, and in the course of its opinion passes upon the effect of the 1919 statute, saying (258 Fed. 820):

"From what has been said it is evident that, unless the established rules of law have been changed by recent legislation, this Court is not at liberty to review the evidence, to see whether any testimony has been erroneously admitted, or whether there were errors in the charge as actually given, or whether any requests to

charge were improperly refused. In *Struthers vs. Drexel*, *supra*, the Supreme Court declared that the matters not spread upon the record in legal manner are not in the record for any purpose; and it is also evident that, if the testimony and the charge and the requests to charge had been put into the record by a bill of exceptions, the Court would still be powerless to review any ordinary errors therein for want of exceptions duly taken.

“But we find that Congress, by an act approved on February 26, 1919 (40 Stat. 1181, c. 48), has amended section 269 of the Judicial Code by providing that:

“ ‘On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties’.

“It becomes necessary, therefore, to consider to what extent this act has modified the principles above laid down. *We are to examine ‘the entire record before the Court’.* Now, *we have seen that under the decisions of the Supreme Court the testimony and the charge and refusals of requests to charge are not in the record before the Court, although they may be found in the transcript, unless they have been put into the record by a bill of exceptions.* We

are not prepared to say that it was the intention of the Congress, by the act recently passed, to make bills of exceptions no longer necessary, and that hereafter we are to hold that any matter found in the transcript is to be regarded as in the record, even though the Trial Judge has not examined and certified to its correctness by putting his signature to a bill of exceptions. We do not think that such could have been the intention. The 'record' to which the act refers is that which is legally the record, and in examining that we are to disregard 'technical errors, defects or exceptions which do not affect the substantial rights of the parties'. But the matters which could not have been regarded as in the record prior to the passage of the act are not to be held to be in the record since the passage of the act. We are still unable to review the evidence, the charge, and the refusals to charge."

The above decision was followed by this Court in *Smith vs. United States*, 261 Fed. 605.

It seems clear, therefore, that the amendment of Section 269 cannot be relied upon in order to permit a review of the ruling on the motion to remand or in answer to defendant's motion to strike the bill of exceptions from the transcript, because this statute does not do away with the necessity for a bill of exceptions properly settled and allowed in order to obtain a review of the proceedings in the Court below.

We, accordingly, submit that the Trial Court very properly ordered that portion of the bill of exceptions relating to the motion to remand stricken therefrom and that this Court should sustain the motion of defendant in error to strike the balance of the bill of exceptions and thereupon affirm the judgment, for the reason that all of the errors assigned arise upon such bill of exceptions.

THERE BEING NO SPECIAL FINDINGS OF
FACT, THIS COURT WILL NOT DETERMINE
THE SUFFICIENCY OF THE EVIDENCE.

This cause was tried by the Court without a jury, pursuant to written stipulation, and the Court rendered an opinion in favor of the defendant in error (Tr. pp. 34-43). The record shows that no special findings were requested by counsel for either party, or made by the Court, and that there was no motion of any kind by either party calling for a ruling on the sufficiency of the evidence. Plaintiff in error has, however, attempted by his bill of exceptions to make it appear that the Court found on certain issues of fact, which findings were not sustained by the evidence. (Tr. pp. 107-111.) The bill of exceptions as allowed by the Court shows that all of these alleged findings were contained in the written opinion and assignments of error Nos. 3, 4, 7, 8, 9 and 10 are based entirely on the ground of insufficiency of the evidence to support such alleged findings. Hence, the question necessarily arises to what extent this Court will or can consider the evidence in this cause

in view of the absence of any special findings or any motion which would be the equivalent of a motion for a directed verdict if the case had been tried before a jury. And we find that the rule of practice is established with complete unanimity in this Court, the Circuit Courts of Appeals of other Circuits, and the Supreme Court of the United States, that the Federal Appellate Courts will not consider the sufficiency of the evidence in such cases and that the Court's opinion cannot be referred to as a means of determining the facts found by the Court.

In *British Queen Min. Co. vs. Baker Silver Min. Co.*, 139 U. S. 199, 35 L. Ed. 147, the Court defines the rule as follows:

“This case was tried by the Circuit Court without a jury, and under sections 649 and 700, Rev. Stat., the finding must be ‘either general or special’. It cannot be both. Here there was a general finding.

“The record contains a bill of exceptions, but no exceptions to the rulings of the Court in the progress of the trial of the cause were thereby duly presented, and although after reciting the evidence it is therein stated that ‘the Court thereafter and during the said term made the following findings of fact and judgment thereon’, which is followed by an opinion of the Court assigning reasons for its conclusions, this cannot be treated as a special finding enabling us to determine whether the facts found support the judgment, nor can the general finding be disregarded.”

In the case at bar, there were no special findings and the record contains all the evidence as stated on page 55 of the transcript, but the Court made no finding except the general finding stated in the judgment. In *Dickinson vs. Planters Bank*, 83 U. S. 250, 21 L. Ed. 278, the record was similar to the case at bar and the Court declares:

“It is, however, only when the finding is special that the review of this Court can extend to the determination of the sufficiency of the facts found to support the judgment. Here the record as returned contains what is stated to have been all the evidence in the cause, but the Court has not found what the evidence proves nor any other facts except that stated in the judgment. * * * Some facts indeed are stated in the opinion of the Court that seems to have accompanied the judgment, but they are not stated as a special finding. * * * We cannot therefore inquire whether the evidence as delivered by the witness was sufficient under the circumstances * * * but though the finding was general, any ruling of the Court in the progress of the trial if excepted to at the time and duly presented by bills of exceptions may be reviewed by us.”

In the recent case of *Northern Idaho and Montana Power Co. vs. A. L. Jordan Lumber Co.*, 262 Fed. 765, at page 766, this Court said:

“On the trial no exceptions were taken to any ruling of the Court, and no request was made

for special findings, or for a finding in favor of the defendant in the action. *The plaintiff in error refers to the opinion of the Court below as containing special findings of fact, but the opinion cannot be resorted to for that purpose.* Dickinson vs. Planters Bank, 16 Wall. 257, 21 L. Ed. 278; British Queen Min. Co. vs. Baker Silver Min. Co., 139 U. S. 222, 11 Sup. Ct. 523, 35 L. Ed. 147; Saltonstall vs. Birtwell, 150 U.S. 417, 14 Sup. Ct. 169, 37 L. Ed. 1128; York vs. Washburn, 129 Fed. 564, 64 C. C. A. 132; Hayden vs. Ogden Savings Bank, 138 Fed. 91, 85 C. C. A. 558; United States vs. Sioux City Stock Yards Co., 167 Fed. 127, 92 C. C. A. 518; Gibson vs. Luther, 196 Fed. 203, 116 C. C. A. 35.

“In the absence of a special finding, the judgment must be affirmed, unless the complaint fails to state a cause of action, or the bill of exceptions presents some erroneous ruling of the Court in the progress of the trial. Norris vs. Jackson, 9 Wall. 125, 19 L. Ed. 608. There being in the present case no ruling of the Trial Court, and no special finding of fact, but only a general finding, the latter must be accepted as conclusive, and this Court can go no further than to affirm the judgment. Lehnen vs. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; Dunsmuir vs. Scott, 217 Fed. 200, 133 C. C. A. 194; Pennsylvania Casualty Co. vs. Whiteway, 210 Fed. 782, 127 C. C. A. 332.” (Our italics.)

Numerous other cases to the same effect decided by this Court are cited in the Brief of the Argument above, and as the rule is so thoroughly established we will not repeat them here. We have been unable to find any exception to this rule in the decisions of this Court, and for that reason we will not go into an extended discussion of the evidence presented to the Trial Court on the trial.

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION TO REMAND.

As we have already pointed out, the portion of the bill of exceptions relating to the hearing on motion to remand was ordered stricken by the Trial Court (Tr. p. 120), and the exception to such ruling is not properly reviewable upon the present writ of error. We have also pointed out that the Act of February 26, 1919, amending section 269 of the Judicial Code, does not relieve plaintiff in error from the necessity of furnishing this Court a bill of exceptions duly settled and allowed covering the ruling he seeks to attack.

Buessel vs. U. S., 170 C. C. A. 105, 258 Fed. 811.

Smith vs. U. S., 261 Fed. 605.

If the Court should, however, consider this record, it would be seen at once that the Trial Court's action was correct and proper. Plaintiff in error contended that he was a citizen of California, and therefore the action was not pending in the proper district. The Trial Court found that he was not a citizen of

California but was a citizen of Idaho and there was ample evidence to sustain such ruling, because the record showed that he had held office and voted in the State of Idaho long after he bought a house in California and until shortly before the action was brought, and the record also showed that he registered at Idaho hotels giving his residence as Warren, Idaho. In such a case the finding of the Trial Court on a disputed question of fact will not be reversed.

Schoenwald vs. Bishop (C. C. A. 9th Circuit),
244 Fed. 715, 718.

Even if plaintiff in error had been a citizen of California so that the suit would not have been maintainable in the Idaho District over defendant's objection, there is, nevertheless, ample authority for denying the motion to remand on the ground that the privilege is one personal to the defendant which is waived by the petition for removal. See:

L. & N. Railway Co. vs. Western Union Tel.
Co., 218 Fed. 91.

Hohenberg vs. Mobile Liners, 245 Fed. 169.

Bogue vs. Atchison etc. Ry. Co., 193 Fed. 728.

Bagenas vs. Southern Pac. Co., 180 Fed. 887.

Keating vs. Pennsylvania Co., 254 Fed. 155.

Park Square Automobile Co. vs. American
Locomotive Co., 222 Fed. 979.

Doherty vs. Smith, 233 Fed. 132.

Earles vs. Germain Co., 265 Fed. 718.

In any event, plaintiff in error signed stipulations and went to trial in the Federal Court without mak-

ing any objection and without preserving any bill of exceptions to the ruling he now seeks to reverse, and by so doing he waived any objections he might have had to the venue of the action.

Re Moore, 209 U. S. 490, 52 L. Ed. 904.

Western Loan & Savings Co. vs. Butte Co.,
210 U. S. 368, 52 L. Ed. 1101.

Kreigh vs. Westinghouse Co., 214 U. S. 506,
53 L. Ed. 1061.

THE PROVISIONS OF THE CONTRACT FOR
THE TRANSMISSION OF THIS TELEGRAM
ARE BINDING UPON PLAINTIF AND PRE-
VENT HIS RECOVERY.

In addition to the first defense in the answer, defendant in error has pleaded three separate affirmative defenses based upon the provisions found on the back of the telegraph blank on which the telegram in question was written. This telegram and the blank are set out in full in the record (Tr. pp. 29-34). Defendant's Exhibit B. (Tr. pp. 99-104) is a copy of the blank on which this telegram was written, certified by the Secretary of the Interstate Commerce Commission as being on file with the Commission, but by inadvertance in preparing the bill of exceptions the message itself has been copied on this blank. Both these exhibits are on file with this Court.

The clauses in the contract of transmission specially pleaded by defendant are as follows:

“All telegrams taken by this company are subject to the following terms:

“To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the telegram and this company as follows:

“1. The company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED telegram, beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure telegrams.

“2. In any event the company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless

a greater value is stated in writing hereon at the time the telegram is offered to the company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof. * * *

“6. The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the company for transmission.” (Tr. pp. 99-101.)

We contend that these provisions are binding upon plaintiff in error and bar his recovery whether he bases his action upon the ground that T. J. Jones, who sent the telegram, was his agent or upon the ground that defendant company owed him a legal duty to transmit and deliver the telegram promptly in view of its status as a public service corporation. Plaintiff in error argues that there was no relation of agency between him and Jones, who sent the telegram, but necessarily if Jones was plaintiff's agent in the transaction, plaintiff is bound by the terms of the contract under which the telegram was transmitted. The complaint and the admission of plaintiff in the record shows clearly that an agency existed or at least that the telegram was sent at the express request of plaintiff.

In paragraph III of the complaint (Tr. p. 8) it is alleged:

“That the plaintiff desired to sell his said fifty shares of stock and was then about to leave Boise for his home in Oakland, California.

That prior to his departure for California, and early in the month of November, 1917, plaintiff had an oral understanding with one T. J. Jones, who resides at Boise, Idaho, and who was also an owner of stock in said Idaho National bank, and who also desired to sell his stock, which understanding was that plaintiff and said Jones should endeavor to sell their said stock jointly, and that said Jones should notify plaintiff at his home in Oakland, California, whenever said Miller was ready to purchase their said stock."

In paragraph V (Tr. pp. 8 and 9), it is alleged:

"That on the 30th day of November, 1917, the said T. J. Jones acting under the arrangement with plaintiff set forth in paragraph III hereof presented to the defendant at its office in Boise, Idaho, a certain message which was typewritten upon one of defendant's telegraph blanks, etc."

In plaintiff's letter of June 18, 1918, to defendant, he states:

"I was extremely desirous of selling this stock and this offer would have been immediately accepted if this telegram had been delivered to me. *It was sent to me by my associate and agent, Mr. T. J. Jones, of Boise, Idaho.* After being delivered to your company the price of the telegram was paid by Mr. Jones for me."

Certainly upon this state of facts Jones was plaintiff's agent for sending the message, and if so, under

the clearest principles of law he was bound by the contract of his agent for the transmission of the message. In *Coit vs. Western Union Tel. Co.*, 130 Cal. 657, 63 Pac. 83, the Court states:

“In discussing this identical question, Thompson on the Law of Electricity (section 237) says: ‘In such a case is the receiver of the message bound by the stipulation, assuming that the sender was bound by it? If the right of action which the receiver has against the company rests upon privity of contract, and depends upon the circumstances that the sender was his agent—in other words, if the contract with the telegraph company was the contract of the receiver through his agent, the sender—then, on the most unshaken ground, the receiver would be bound by this condition, if the circumstances were such that it would bind the sender’. Now, in this state, by the authorities already cited, it is plain that Dennis was bound by the stipulation; and, having power to make it, his principal can only stand in his shoes.”

In *Halsted vs. Postal Tel. C. Co.*, 193 N. Y. 293, 19 L. R. A. (N. S.) 1021, and on page 1027, the Court states:

“It is our judgment that, where the receiver of a message has, by a special request, procured it to be sent by the telegraph, he becomes bound by any reasonable contract made by the sender with the telegraph company for its transmis-

sion, and is limited in his claim for any damages for a loss occasioned by error or mistake in transmission, where the stipulations for the repetition or for the insurance of the message have not been availed of, to the amount stipulated in the contract.”

New York Fruit Market vs. Western Union Tel. Co., 190 App. Div. (N. Y.) 160.

Dant vs. Western Union Tel. Co., 42 App. Cas. (D. C.) 398.

Anniston Cordage Co. vs. Western Union Tel. Co., 161 Ala. 216, 30 L. R. A. (N. S.) 1116, note.

It is true that in paragraph V of the complaint plaintiff alleges that the “defendant received and accepted said message and became thereby obligated to forward same by telegraph to plaintiff in Oakland, California”, thus apparently attempting to base his action upon a supposed legal duty of defendant as a public service company rather than upon the contract, and he contends that for this reason he is not bound by the provisions we have quoted. But for the sake of argument let us assume that the action is in tort. The legal duty was only to deliver the telegram in accordance with the contract and the rules and regulations of defendant company as approved by the Interstate Commerce Commission. In the absence of the contract there was no legal duty whatever, and although plaintiff was merely the addressee of the telegram, his alleged right of

action is necessarily based upon the contract and he cannot at the same time claim the benefit of such contract and repudiate its terms.

In the case of *McGehee vs. Western Union Telegraph Company* (Ala.) 50 So. 205, the action was based upon the theory of a public duty and the action was by the addressee of the telegram. The Court in holding that he was bound by the terms of the contract made the following observations:

“The underlying reason is, and must have been that in this class of cases, the duty, conferring the right of action *ex delicto* on one not a party to the contract, is necessarily colored by the contract out of which the duty arises. The duty, whether within the promise of the contract or imposed by law because of the public character and service of the company, must be the same, viz., that it will, with due diligence and skill, transmit and deliver the message as the sender and the company have stipulated.

* * * He (the addressee) cannot establish a relation to the company through appeal to a contract and then repudiate, if to his advantage, provisions of the contract. He must accept and be bound by the whole contract or none of it.”

The leading case on this question is now *Gardner vs. Western Union Telegraph Company*, 145 C. C. A. 399 (8th Circuit), 231 Fed. 405, where the action was brought by the addressee for delay in the delivery of an unrepeatd telegram. The terms of the

contract were the same as those involved here, and the Court, at page 408, says:

“Assuming for the present that the regulation was valid as between Scoville and the company, the question then presents itself as to whether it is binding on the plaintiff, notwithstanding the fact that this action is in tort and not on the contract.

“There is not entire harmony among the authorities upon this question, but upon principle and sound reason we think the plaintiff is bound by the regulation in relation to the presentation of claims for damages. Let us analyze plaintiff’s case. He says that the company was negligent in failing to deliver the message promptly. Negligence arises from a violation of duty owing by one person to another. If there is no duty, there is no negligence. Without the contract between Scoville and the company, the latter owed the plaintiff no duty, and hence there could be no negligence in the absence of the contract. So it plainly appears that plaintiff would have no cause of action except for the contract, because the duty of the company arose from the contract. May the plaintiff charge the company with the duty arising from the contract, and at the same time repudiate one of the conditions upon which the duty was assumed? We think not.”

The following cases, all brought in tort by the sender of the telegram are cited in support of this

proposition and on examination they will all be found to sustain it:

Western U. Tel. Co. vs. Culberson, 79 Tex. 65, 19 S. W. 219.

Stone vs. Postal Tel. etc. Co. (R. I.), 76 Atl. 762, 29 L. R. A. (N. S.) 795.

Western U. Tel. Co. vs. Bank of Spencer, 53 Okla. 398, 156 Pac. 1175.

Bailey vs. Western U. Tel. Co., 97 Kan. 619, 156 Pac. 716.

Western U. Tel. Co. vs. Schade (Ky.), 192 S. W. 924.

Western U. Tel. Co. vs. Lee (Ky.), 192 S. W. 70.

Meadows vs. Postal Tel. etc. Co. (N. C.), 91 S. E. 1109.

Western U. Tel. Co. vs. Orr (Okla.), 158 Pac. 1139.

See to the same effect the more recent cases of:

Poor vs. Western U. Tel. Co., 196 Mo. App. 557, 196 S. W. 28.

Jacobs vs. Western U. Tel. Co., 196 Mo. App. 300, 196 S. W. 31.

Klotz vs. Western U. Tel. Co., 175 N. W. 825.

Postal Tel. Cable Co. vs. Warren-Godwin Lumber Co., 251 U. S. 27, 64 L. Ed., where the Gardner case is expressly approved.

SINCE THE ACT OF JUNE 18, 1910, QUESTIONS RELATING TO INTERSTATE MESSAGES MUST BE DETERMINED BY THE FEDERAL LAW.

In this connection the cases decided since the Interstate Commerce Act was amended by the Act of Congress of June 18, 1910, show clearly that the question of how far the addressee of a telegram is bound by the terms of the contract under which it was sent and all questions concerning the reasonableness and effect of the provisions of this contract are matters of Federal and not State law, and that State constitutional and legislative provisions upon the subject must be disregarded by both State and Federal Courts. The statute in question amended the Interstate Commerce Act by providing that the provisions of the act should apply "to telegraph, telephone and cable companies engaged in sending messages from one state, territory or district of the United States to any other state, territory or district." It is also provided by said act that "messages by telegraph, telephone or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeatd, letter, commercial, press, government and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages."

The effect of these provisions has been conclusively determined by the Supreme Court of the United States in the recent cases of *Postal Telegraph Cable Company vs. Warren-Godwin Lumber Company*, 251

U. S. 27, 64 L. Ed....., decided December 18, 1919, and Western Union Telegraph Company vs. Boegli, 251 U. S. 315, 64 L. Ed....., decided January 12, 1920. In the former case the Court, speaking through Mr. Chief Justice White, said:

“We come at once, therefore, to state briefly the reasons why we conclude that the Court below mistakenly limited the Act of Congress of 1910, and why, therefore, its judgment was erroneous.

“In the first place, as it is apparent on the face of the Act of 1910 that it was intended to control telegraph companies by the Act to Regulate Commerce, we think it clear that the Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish—a purpose which would be wholly destroyed if, as held by the Court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent, and it may be, conflicting, local laws.

“In the second place, as in terms the act empowered telegraph companies to establish reasonable rates, subject to the control which the Act to Regulate Commerce exerted, it follows that the power thus given, limited, of course, by such control, carried with it the primary

authority to provide a rate for unrepeat-
ed telegrams and the right to fix a reasonable limita-
tion of responsibility where such rate was
charged, since, as pointed out in the Primrose
case, the right to contract on such subject was
embraced within the grant of the primary rate-
making power.

“In the third place, as the act expressly pro-
vided that the telegraph, telephone, or cable
messages to which it related may be “classified
into day, night, repeated, unrepeat-
ed, letter, commercial, press, government and such other
classes as are just and reasonable and different
rates may be charged for the different classes
of messages”, it would seem unmistakably to
draw under the Federal control the very power
which the construction given below to the act
necessarily excluded from such control. Indeed,
the conclusive force of this view is made addi-
tionally cogent when it is considered that, as
pointed out by the Interstate Commerce Com-
mission (*Cultra vs. Western U. Tel. Co.*, 44
Inters. Com. Rep. 670), from the very inception
of the telegraph business, or at least for a period
of forty years before 1910, the unrepeat-
ed message was one sent under a limited rate and
subject to a limited responsibility of the char-
acter of the one here in contest.

“But we need pursue the subject no further,
since, if not technically authoritatively con-
trolled, it is in reason persuasively settled by

the decision of the Interstate Commerce Commission in dealing in the case above cited with the very question here under consideration as the result of the power conferred by the Act of Congress of 1910; by the careful opinion of the Circuit Court of Appeals of the eighth circuit, dealing with the same subject (*Gardner vs. Western Union Teleg. Co.*, 145 C. C. A. 399, 231 Fed. 405); and by numerous and conclusive opinions of State Courts of last resort, which, in considering the Act of 1910 from various points of view, reached the conclusion that that act was an exertion by Congress of its authority to bring under Federal control the interstate business of telegraph companies, and therefore was an occupation of the field by Congress which excluded state action." (Citing numerous decisions.)

In the *Boegli* case the Court says:

"The proposition that the Act of 1910 must be narrowly construed so as to preserve the reserved power of the state over the subject in hand, although it is admitted that that power is in its nature Federal, and may be exercised by the state only because of non-action by Congress, is obviously too conflicting and unsound to require further notice. We, therefore, consider the statute in the light of its text, and, if there be ambiguity of its context, in order to give effect to the intent of Congress as manifested in its enactment.

“As the result of doing so, we are of opinion that the provisions of the statute bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate, by penalizing the negligent failure to deliver promptly an interstate telegram, and that the Court below erred, therefore, in imposing the penalty fixed by the state statute.”

See also *Gardner vs. Western U. Tel. Co.*, 145 C. C. A. 399 (8th Circuit), 231 Fed. 405.

THE COURT WAS WITHOUT JURISDICTION TO DETERMINE THAT ANY OF THE PROVISIONS OF THE CONTRACT FOR THE TRANSMISSION OF THIS TELEGRAM WERE UNREASONABLE, AS THAT MUST BE DETERMINED BY THE INTERSTATE COMMISSION AND IT HAS HELD THESE REGULATIONS TO BE REASONABLE.

The record shows that the telegraph blank on which this message was written is on file with the Interstate Commerce Commission, as are the rules governing unrepeatd messages, etc. (Tr. pp. 98-105, defendant's Exhibits B and C), hence, it must be presumed that they have the approval of the Com-

mission and as has frequently been held, if anyone is dissatisfied with these rates and regulations, relief must be sought before the Commission in the first instance. This was held in *United States vs. M. & M. Traffic Association*, 242 U. S. 178, 61 L. Ed. 233, 239, where the Court said:

“To permit communities or shippers to seek redress for such grievances in the Courts would invade and often nullify the administrative authority vested in the Commission.”

In *Williams vs. Western Union Tel. Co.*, 203 Fed. 140, at page 145, the Court said:

“Even if the plaintiff’s case were based upon an alleged unreasonable regulation, which it is not on the pleadings, it is a question which cannot be entertained primarily in this Court. The question must be first raised before the Interstate Commerce Commission. *Texas & Pacific Railway Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *Baltimore & Ohio R. R. Co. vs. United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292.”

In *Gardner vs. Western Union Tel. Co.*, 231 Fed. 405, an action by the receiver of a telegram as in this case, defendant relied upon one of the stipulations upon the message blank, which was expressly declared to be void by the Constitution of Oklahoma, where the action arose. The Circuit Court of Appeals, basing its opinion upon decisions of the Inter-

state Commerce Commission and various decisions of the Supreme Court, held the regulation to be valid and in the closing paragraph of this opinion said (p. 412):

“We are, therefore, of the opinion that Congress, having taken possession of the field of interstate commerce by telegraph, the provision of the Constitution of Oklahoma relied upon has become inoperative for the purpose of striking down the regulation in question. Whether the regulation is a reasonable one or not is, in our judgment, a question for the Interstate Commerce Commission to determine. *Mitchell Coal & Coke Co. vs. Pa. R. Co.*, 230 U. S. 247, 33 Sup. Ct. 916, 57 L. Ed. 1472; *Tex. & Pac. Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *Chicago & Alton Ry. Co. vs. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033.

It is this case of *Gardner vs. Western Union Telegraph Co.* which is expressly approved by the Supreme Court and adopted as a part of the reasoning of the Court in *Postal Tel. Co. vs. Warren-Godwin Lbr. Co.*, 251 U. S. 27.

An instructive case is:

Western Union Tel. Co. vs. Bank of Spencer,
53 Okla. 398, 156 Pac. 1175.

Referring to the reasonableness of the stipulations of the telegraph company with regard to the transmission of messages, the Court says:

“The reasonableness of the regulations prescribed by the defendant is a question, the jurisdiction of which to determine is conferred by the Act of June 18, 1910, upon the Interstate Commerce Commission, and this Court has no jurisdiction in this action to declare said rules and regulations unreasonable, but this question must be raised before the Interstate Commerce Commission.” (Citing numerous cases.)

This is one of the “numerous and conclusive opinions of State Courts of last resort” referred to by the Supreme Court of the United States in the case of *Postal Telegraph Co. vs. Warren-Godwin Lumber Co.*, 251 U. S. 27.

To the same effect are:

Potlatch Lumber Co. vs. Spokane Ry. Co.,
157 Fed. 288.

Great Northern R. R. Co. vs. Kalispell Lumber Co., 91 C. C. A. 63 (9th Circuit), 165 Fed. 25.

Erie R. R. Co. vs. Stone, 244 U. S. 332, 61 L. Ed. 1173.

The Interstate Commerce Commission in the case of *Cultra vs. Western Union Telegraph Co.*, in an exhaustive opinion upheld the reasonableness of the provisions of the contract here involved and announced its conclusions in the following language:

“Our conclusion upon the record is that the Congress by the language used in the amendatory act of 1910, has manifested a definite in-

tention to place under the jurisdiction and control of this Commission the rates and practices of interstate telegraph companies as well as the rules, regulations, conditions and restrictions affecting their interstate rates; that the rate voluntarily used by the senders of the message in question was an unrepeatd rate to which was lawfully attached as a fundamental feature of it the restricted liability insisted upon here by the defendant; that the Congress has expressly authorized such rates with a restricted liability attached; that such rates are not therefore contrary to public policy but on the contrary are binding upon all until lawfully changed; and that neither the interstate rates of the defendant nor the rules, practices, conditions and restrictions affecting these rates have been shown in this proceeding to be unreasonable or otherwise unlawful."

The Supreme Court of the United States in the Warren-Godwin Lumber Co. case, *supra*, followed the reasoning of the Commission in the above case and based its decision in part upon that of the Commission, and we submit that the conclusion thus reached by the Commission is binding upon the Court in collateral proceedings, such as the present, and must be taken as conclusively establishing the reasonableness and validity of the rules and regulations of the company and clauses of the contract in question, all of which are shown to be on file with the Commission.

THE CLAUSE REQUIRING WRITTEN NOTICE
OF CLAIM WITHIN SIXTY DAYS FROM FIL-
ING THE TELEGRAM IS A COMPLETE DE-
FENSE.

As already pointed out, three different clauses of the contract of transmission are set up in the answer. The first is the clause requiring a claim in writing to be made within sixty days from the filing of the message. The learned District Judge denied plaintiff's right to any recovery on the ground that he had failed to make such claim, and if this clause is sustained in its application to the case at bar, the other clauses need not be considered. The second clause is the unrepeatd message clause and this would allow plaintiff to recover the toll paid on the message, amounting to sixty-five cents, which the record shows was tendered to him and refused (Tr. pp. 66-67, Plaintiff's Exhibits 2 and 3). The third clause is the valuation clause which would limit the possible recovery to fifty dollars, in view of the fact that no greater value was placed upon the telegram when it was filed, and the rate of transmission was determined on the fifty dollar valuation.

The second separate defense in the answer pleads this clause, which is No. 6 in the contract of transmission and is as follows (Tr. p. 31): "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed for transmission."

The validity of this clause was involved in the case

of Gardner vs. Western Union Tel. Co., 145 C. C. A. 399, 231 Fed. 405, where the Circuit Court of Appeals of the Eighth Circuit said at page 409:

“We have disposed of the question under discussion on the theory that the 60-day clause was valid at common law as between Scoville and the company. We have no doubt of this. Southern Express Co. vs. Caldwell, 88 U. S. (21 Wall.) 264, 22 L. Ed. 556; M. K. & T. Ry. Co. vs. Harriman Brothers, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; Whitehill vs. Western Union Tel. Co. (C. C.), 136 Fed. 499; Manier vs. Western Union Tel. Co., 94 Tenn. 442, 29 S. W. 732.”

The Court went on to hold that only the Interstate Commerce Commission could determine the regulation to be reasonable and directed judgment to be entered for the defendant telegraph company, because the notice was not given. This is the “careful opinion” referred to by the Supreme Court of the United States in the Warren-Godwin Lumber case, *supra*, as persuasively settling the question of the validity and effect of the regulations contained on the back of the telegraph blank.

In view of this approval, further quotation from the authorities seems unnecessary, but we have cited a number of cases sustaining this view in the Brief of the Argument, *supra*, and we do not think that, in view of these authorities, the intimation of the learned Trial Judge that the application of this pro-

vision under the circumstances of the case at bar would be unduly harsh, should be given the weight contended for it by counsel for plaintiff. Counsel for plaintiff argues that in view of the statement of the learned Trial Court quoted at page 19 of his brief, the clause is unreasonable and there is no provision in the contract for requiring plaintiff to make his written claim within sixty days from the discovery of the loss. In other words, plaintiff takes the position that because he did not know the telegram had been filed for transmission until more than sixty days after it was so filed, he is completely absolved from giving notice, and he further contends that the requirement was waived, but as we read the decision of the learned Trial Judge, he was extending the strict provision of the contract in plaintiff's favor and as he points out, there is authority for the proposition that a written notice under the circumstances given to the company within sixty days from discovery of the fact that the telegram was not delivered would have been in time. It therefore hardly seems fitting for plaintiff to argue that in making this ruling, which would have been favorable to him if he had not slept on his rights, the Court made a new contract for the parties. We have already shown that the Trial Court had no jurisdiction to determine the reasonableness of any of the provisions in the contract and if he considered the clause in question inapplicable because of plaintiff's lack of knowledge, he certainly was correct in holding that the written claim must

be made at least within sixty days of the discovery. In *Postal Telegraph Co. vs. Nichols*, 89 C. C. A. 585, 159 Fed. 43, this Court said:

“It appears that the claim for damages was presented to the plaintiff in error on the 17th day of August, 1903. There was testimony on the part of the defendants in error to the effect that they did not know of the non-delivery of the telegram to Captain Richardson prior to July 11, 1903, which was much within the 60-day period.”

In *Western Union Tel. Co. vs. Lee*, 174 Ky. 210, 192 S. W. 70, quoted at page 23 of plaintiff's brief, a similar holding was made by the Court, and we think these two decisions clearly imply that if the claim had not been made within sixty days from discovery, the provisions of the contract would have amounted to a bar.

The case of *Larsen vs. Postal Telegraph Company*, 150 Iowa 748, 130 N. W. 813, also cited by plaintiff, interpreted a special provision of the Iowa statute which would be invalid since the 1910 amendment to the Interstate Commerce Act and that case accordingly can have no application here. Plaintiff is accordingly forced to the argument that the provisions of this clause were waived by the company by reason of the fact that they had knowledge of the loss in February, 1918, more than sixty days after the telegram was filed, and that there was some talk of an adjustment. As argued in a previous

portion of this brief, we do not think this Court will consider the sufficiency of the evidence on the question of waiver because there are no special findings, but if the Court desires to go into the evidence we call attention to the testimony of Mr. Flora at pages 96 and 97 of the transcript, showing that the authority of the local manager was limited to adjustment of claims amounting to less than twenty-five dollars, or possibly at the time the message was sent to only ten dollars, and hence there could be no presumption of waiver by reason of the conversations with Mr. Hackett. The authorities cited by counsel for plaintiff on the question of waiver of this clause are all State Court decisions and with the possible exception of the case of *Western Union Telegraph Company vs. Fitts*, 79 S. E. 156, they all involved causes of action accruing before 1910. In the case last mentioned, it does not appear when the cause of action accrued, but there is no reference whatever to the Federal rule upon the question. The cases involving insurance policies are clearly not analogous and we do not think they require further mention.

Counsel also dismisses the Federal cases involving similar clauses in bills of lading with the assumption that they arose under a different statute and that therefore the Trial Court erred in citing some of these decisions as a basis for his opinion. The facts are, however, that the Carmack amendment of the Hepburn bill, 34 St. L. 595, was involved in all of these cases except, possibly, the case of *Gooch vs. Oregon Short Line R. Co.*, 264 Fed. 664, recently

decided by this Court, and that the statute to which counsel undoubtedly refers is the so-called Cummins Act of March 4, 1915, which made special requirements in regard to notice of claim, etc., in bills of lading. The doctrine of the Federal Courts under both statutes has been that the clauses of the bills of lading could not be waived or varied by consent of the parties, because to do so would result in a variation from the rule of uniformity prescribed by the Interstate Commerce Act and would also result in discrimination in favor of certain shippers contrary to such act. Since 1910, however, a telegraph company engaged in interstate business is subject to exactly the same rules requiring uniformity and absence of discrimination, as a carrier of goods, and we think a reference to the recent cases on the subject will show that the provision in question was not waived on the evidence, and apparently could not have been waived by the local agent at Boise talking with this plaintiff or his agent Jones, about the claim. This is especially true in view of the fact that the record shows that the amount claimed by plaintiff was never mentioned in any of these conversations, and in fact there was no way to determine it at that time. The record shows that the party desiring to purchase this bank stock was never financially able to buy it after December 4, 1917, and the assumption made several times in counsel's brief that the bank was already in process of liquidation in February, 1918, when plaintiff first learned that the telegram had been sent is not justified by the record and

is not true in fact. Plaintiff's own evidence shows that the liquidation occurred some time later when he was at the mine, although the precise date is not fixed.

In the recent case of *Kerns vs. Western Union Telegraph Co.* (Mo. App.), 198 S. W. 1132, the Court considered this question of waiver with some care and made the following observations:

“The Federal decisions concerning the liability of common carriers of property in Interstate Commerce are to the effect that such provisions affecting liability cannot be waived, for to allow them to do so would be to afford an opportunity to make discriminations. It would seem that inasmuch as the Interstate Commerce Law as amended by the Act of June 18, 1910 (36 U. S. Stats. L. 544, C. 309) allows interstate telegraph companies to make classifications of service and charge reasonable rates for the different classifications, but requires that such rates shall be uniform for the same service and classification, it follows that responsibility for failure to properly perform such service should be uniform, and that such company would not be allowed to waive provisions in the contract affecting their liability any more than an interstate carrier of property would be allowed to do so.”

The Court held in that case that mere knowledge by the company's local agent was insufficient to show a waiver.

In *Georgia, Florida, etc. Co. vs. Blish Milling Company*, 241 U. S. 190, 60 L. Ed. 948, the Supreme Court considered the question of waiver in the following language:

“But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed.”

In *St. Louis etc. Co. vs. Starbird*, 243 U. S. 592, 61 L. Ed. 917, the Court holds that notice to the dock master was not a compliance with a requirement of the bill of lading that claims of damage be reported to the delivering line within 36 hours. The Court points out that the case arose before the Act of March 4, 1915, hence it is clearly an authority here.

In *Southern Pacific Ry. Co. vs. Stewart*, 248 U. S. 446, 63 L. Ed. 350, the cause of action also arose before 1915 and the Supreme Court held that it was error to submit the question of waiver to the jury and that the Court should have granted the carrier's request for a directed verdict. In that case also it appeared that the local agent of the company knew of the loss immediately. In *Gooch vs. Oregon Short*

Line R. Co., 264 Fed. 664, this Court quotes the following from the Blish Milling case at page 666:

“Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation. And to this end it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it, even with respect to its own operations.”

At page 667 this Court said:

“It is true that in the present case the carrier had actual notice of the injury complained of, and through its agents sought, without success, a settlement of the damages occasioned thereby; but the offer of settlement was refused, and at no time, so far as appears, was the amount of his claim stated, even verbally, by the plaintiff in error, or by any representative of his.”

We think the cases above cited are clearly applicable and that in order to prevent discrimination and to uphold the rule of uniformity prescribed by the Interstate Commerce Act, it is necessary that the rule applied to carriers of goods under the Act should also be applied to telegraph and cable companies.

THE UNREPEATED MESSAGE CLAUSE LIMITS THE RECOVERY TO THE AMOUNT PAID FOR SENDING THE MESSAGE.

As already pointed out, the sixty-day clause is a complete defense to the action and the Trial Court so treated it. But if for any reason this clause is held inapplicable, the unrepeated message clause pleaded in the second separate defense limits the recovery to the amount received by the company for sending the same. The validity of this clause so far as the Federal Courts are concerned is conclusively established by the cases of *Primrose vs. Western Union Telegraph Company*, 154 U. S. 1, 38 L. Ed. 883, and *Postal Telegraph Cable Co. vs. Warren-Godwin Lumber Company*, 251 U. S. 27, 64 L. Ed. In the latter case the Court said:

“In *Primrose vs. Western U. Teleg. Co.*, 154 U. S. 1, 38 L. Ed. 883, 14 Sup. Ct. Rep. 1098, the Court passed upon the validity of a contract made by a telegraph company with the sender of a message by which, in case the message was missent, the liability of the company was limited to a refunding of the price paid for sending it, unless, as a means of guarding against mistake, the repeating of the message from the office to which it was directed to the office of origin was secured by the payment of an additional sum. It was held that such a contract was not one exempting the company from liability for its negligence, but was merely a reasonable condition appropriately adjusting the

charge for the service rendered to the duty and responsibility exacted for its performance. Such a contract was therefore decided to be valid, and the right to recover for error in transmitting a message which was sent subject to it was accordingly limited."

The Court then went on to show wherein the State Court had erred in not following the Primrose decision and held that case to be controlling and reversed the judgment. The exemption from liability for more than the amount paid for sending the telegram under this unrepeatd clause has been upheld also in the following State Court cases, most of which are among those referred to in the opinion in the Warren-Godwin case as being conclusive upon the question:

Western U. Co. vs. Bank of Spencer, 53 Okla. 398, 156 Pac. 1165.

Bailey vs. Western U. Tel. Co., 97 Kan. 619, 156 Pac. 716, affirmed on rehearing, 99 Kan. 7, 160 Pac. 985.

Western U. Tel. Co. vs. Lee (Ky.), 192 S. W. 70.

Meadows vs. Postal Tel. Co. (N. C.), 192 S. E. 1009.

Haskell Implement Co. vs. Postal Tel. Co. (Me.), 96 Atl. 219.

Boyce vs. Western U. Tel. Co. (Va.), 89 S. E. 106.

Western U. Tel. Co. vs. Orr (Okla.), 158 Pac. 1139.

Western U. Tel. Co. vs. Kaufman (Okla.), 162 Pac. 708.

Notwithstanding these cases, plaintiff in error contended in the Trial Court, and argues here, that inasmuch as the telegram was never delivered a repetition of the message could have availed nothing and therefore this clause has no application. He bases his argument on certain observations in *Postal Telegraph Company vs. Nichols*, 89 C. C. A. 585, 159 Fed. 643; *Box vs. Postal Telegraph Co.*, 91 C. C. A. 172, 165 Fed. 138, and *Western Union Telegraph Co. vs. Lange*, 160 C. C. A. 556, 248 Fed. 656.

The cause of action in all of these cases arose before the amendment of 1910 to which we have referred, and in all of them the sender of the telegram stated clearly the special circumstances because of which unusual promptness was required. The first case went entirely upon the doctrine of gross negligence, the company's agent having been advised within fifteen minutes after the telegram was started that the wires were down and it could not get through. In the *Box* case the agent of the company agreed to report delivery of the telegram and in the *Lange* case the agent of the company had received and accepted additional compensation upon which he had agreed to insure promptness. It should also be noted that in none of these cases was the valuation clause, contained in the contract in the

present case and pleaded in the last affirmative defense, a part of the contract. The Lange case was reversed on writ of certiorari by the Supreme Court of the United States under the title of Western Union Telegraph Company vs. Brown, Administrator, on grounds wholly independent of telegraph law. This decision was rendered May 17, 1920, and is to be found in the United States Supreme Court Advance Opinions published by the Lawyers Cooperative Company under date of June 15, 1920, at page 542. The Court stated that it was unnecessary to consider the correctness of the decision of this Court as to the oral contract of the agent or the question of negligence of the company in transmitting and delivering the message.

The Court in the Box case, *supra*, announced the doctrine that repeating messages would be of no avail where the cause of action arose from a delay in delivery or a failure to deliver, and in effect held that the unrepeatable clause only applied to mistakes in transmission, notwithstanding the fact that the clause itself expressly states that the company will not be liable for mistakes or delays in the transmission or delivery or the non-delivery of an unrepeatable telegram beyond the amount received for sending the same and the view announced in the Box case seems to have had some support in the decision of this Court in the Lange case, although the decision itself does not primarily rest upon that proposition. The unrepeatable message clause, however, is more than a mere guarantee against mistakes in transmission

where the message is repeated. The unrepeatd message is one sent at a lower rate without guarantees of correctness in transmission and with only a restricted liability, which restriction is expressly made to cover delays in transmission and delivery and non-delivery as well as mere mistakes in transmission.

A reference to the case of *Cultra vs. Western Union Tel. Co.*, 44 Interstate Commerce Reports 670, illustrates this distinction. The Commission at page 675 said:

“Almost from the beginning of telegraphy in this country the basic rate has been that charged for the transmission of an unrepeatd message, the rates for repeated and special value messages being based upon it. The unrepeatd rate or charge has always been made upon the condition, stated in the contract between the sender and the company, that no liability should attach to the company for errors in transmission or delays in delivery beyond the sum received for sending the message. The higher rate for repeated messages, concurrently maintained for many years with the unrepeatd rate, is predicated in part upon the additional service performed, and in part upon the liability of the defendant to make good any damages incurred through error or delay in the transmission or delivery of the message to the extent of fifty times the rate charged, with a maximum of fifty dollars. For a long time also the de-

fendant has maintained still higher charges under which, upon payment of one-tenth of one per cent. of the amount of the assurance so desired, the defendant within the value so placed upon the message assumes liability to the full extent of the loss sustained. The fundamental difference between the unrepeatd rate and the other two classes of rates is that under the former the sender assumes the risk of error or delay while under the latter the carrier assumes the risk in part or entirely, as the case may be; and the rules fixing the measure of the defendant's liability under these several classes of rates are essentially a part of the rates themselves."

The Commission then quotes from the decision of the Supreme Court of the United States in the leading case of *Primrose vs. Western Union Telegraph Co.*, 154 U. S. 1, 38 L. Ed. 883, at page 893, where the Court said:

"The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate establishes the usual rate as the compensation for the duty of transmitting any message whatever; whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender; and to require payment of the higher rate of half as much again if the company is to be liable

for mistakes or delays in the transmission or delivery or in the non-delivery of a message'."

As said by the Supreme Court of the United States in the passage quoted above from the Warren-Godwin Lumber Company case, the provision of the contract is merely a reasonable condition appropriately adjusting the charge for the service rendered to the duty and responsibility exacted for its performance.

In the recent case of Hartness vs. Western Union Telegraph Co. (S. C.), 99 S. E. 759, the weakness of the reasoning in the Box case is pointed out. The Court says:

"It will thus be seen that His Honor, the presiding Judge, construed the provisions of the contract which limit the liability of the defendant as applicable only to those cases in which damages could have been prevented by a repetition of the message; and that the contract did not contain a limitation upon the liability of the defendant for damages, caused by its negligence in any other manner.

"The ruling of His Honor, the Circuit Judge, was based upon the principles announced in the case of *Box vs. Postal Tel. Cable Co.*, reported in 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566."

Then after quoting from the decision in the Box case, the Court continues as follows:

"The limitations of liability in the rules con-

strued in that case are very different from those now under consideration.

“In 1910 (which was after the decision in the Box case), Congress, in extending the provisions of the so-called Carmack amendment to telegraph and telephone companies, further amended Section 1 by incorporating in it a clause reading as follows:

“ ‘That messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages.’ Act, June 18, 1910, c. 309, 36 Stat. 545 (U. S. Comp. St. 8563).

“The form of contract indorsed upon the telegram herein has been determined by the Interstate Commerce Commission to be reasonable and valid.

“In the case of *Cultra vs. W. U. T. Co.*, 44 Interst. Com. Com’n R. 670, the Interstate Commerce Commission had under consideration the reasonableness of a form of contract which was in no particular materially different from the form upon which the message in this case was written.

“In determining the validity of such form of contract, the commission thus construed its provisions:

“ ‘If, as a matter of law, as the complaint contends, the rate charged and collected for an unrepeatd message carries with it the same protection to the sender or recipient and imposes upon the telegraph company the same liability and degree of care as the rate for a repeated message, then the express authority by the Congress to maintain classification of repeated and unrepeatd messages with the different rates attached thereto, is without significance or effect; for no useful purpose would have been served in authorizing the two classifications taking different rates without recognizing the fundamental difference between them that for years has been well understood and maintained. It seems clear, therefore, that the Congress in recognizing, by the amendment to the act above quoted, these three classes of messages with the different charges attached, has also recognized a distinction in the defendant’s liability under them, and has sanctioned this distinction for the future, subject, of course, to the general provisions in the act requiring all rates, and all rules and regulations affecting rates, to be reasonable and uniform in their application, under like circumstances, for the different kinds of service offered. Such classification of its messages, with the different rates and liabilities attaching to them, having affirmative recognition in the act itself, it follows that when lawfully fixed and offered to the public they are

binding upon the defendant and upon all those who avail themselves of its services, until they have been lawfully changed. Abundant authority for this view is found in numerous decisions by the State and Federal Courts'."

The Court then holds that judgment should have been entered for the amount admitted to be due by defendant company.

An examination of the cases on this clause decided on causes of action arising after the Act of Congress of July 18, 1910, shows that the unrepeat clause has been held to restrict the liability of the telegraph company for delays in transmission or delivery or for failure to transmit or deliver as well as for mistakes in transmission, except in a few State Court cases overruled by the Supreme Court of the United States in the Warren-Godwin Lumber Company case already referred to.

In the Gardner case, which we have referred to frequently, the cause of action arose out of a delay in delivery.

In *Bailey vs. Western U. Tel. Co.*, 97 Kan 619, 156 Pac. 716, the action was for delay in the transmission and delivery of an unrepeat telegram, and the answer pleaded both the unrepeat and the valuation clauses and also the sixty-day clause. The Supreme Court of Kansas held that a demurrer to this portion of the answer was properly overruled.

In *Western U. Tel. Co. vs. Lee*, 192 S. W. 70, the telegram was never delivered, but the Court held

that the unrepeatd clause barred recovery for more than the amount of the tolls.

In *Western U. Tel. Co. vs. Hawkins*, 14 Ala. App. 295, 73 So. 973, the action was brought by the addressee of the telegram and was based on a failure to deliver. The unrepeatd and valuation clauses were specifically pleaded. In upholding these defenses the Court said:

“Nor can it be a matter of doubt that the stipulations with respect to the classification of defendant’s messages, and the varying charges for their transmission and delivery according to the liability of defendant for failure therein, are, within the express terms of the amendment, to be dealt with, as to their reasonableness and validity, only by the Interstate Commerce Commission. This means that until such regulations and practices are condemned by the Commission they cannot be prohibited by state laws or pronounced invalid by the State Courts.”

To the same effect are:

Western U. Tel. Co. vs. First Nat. Bank
(Va.), 83 S. E. 424.

Western U. Tel. Co. vs. Orr (Okla.), 158
Pac. 1136.

Western U. Tel. Co. vs. Kaufman, 162 Pac.
708.

In all these cases the cause of action was based upon a delay in delivery or failure to deliver, and in

all of them the unrepeated message clause was upheld.

We submit, therefore, that these authorities show clearly that the Box, Lange and Nichols cases rest upon certain special facts and that they are not to be considered as binding authorities upon causes of action arising since the Interstate Commerce Act was amended in 1910.

Plaintiff in error argues, however, at some length that the facts show a case of gross negligence and that the unrepeated message clause is not a defense against such gross negligence. Here again it should be noted that the Trial Court made no special findings of fact and that as pointed out in an earlier portion of this brief, this Court will not under its established rule examine the evidence to determine whether or not the facts show gross negligence. It should also be borne in mind that the negligence sued upon was in the failure to transmit and deliver the telegram promptly and that the evidence regarding the inquiries concerning this telegram and the reports given in answer to such inquiries was offered and admitted solely for the purpose of showing that Jones was not negligent in not communicating further with the plaintiff (Tr. p. 87).

We, accordingly, do not think a case of gross negligence is shown by the record and if the record showed gross negligence, we are not contending that the unrepeated message clause would be applicable. The case in that event would fall under the valuation clause and the recovery would be limited to fifty

dollars instead of sixty-five cents, and we wish to call the Court's attention particularly to the fact that the cases cited by plaintiff in error at pages 43 to 55 of his brief, relate to the unrepeatd message clause only and not to the valuation clause.

THE VALUATION CLAUSE LIMITS THE RECOVERY TO FIFTY DOLLARS, EVEN IN CASES OF GROSS NEGLIGENCE BY THE TELEGRAPH COMPANY.

Regardless of what view is taken of either the sixty-day clause or the unrepeatd message clause, the valuation clause contained in Paragraph two of the contract of transmission (Tr. p. 30, p. 100), pleaded in the fourth affirmative defense, provided that "in any event the company shall not be liable for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, *whether caused by the negligence of its servants or otherwise*, beyond the sum of fifty dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon * * * and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof." No such valuation was placed on the telegram and no additional toll was paid or agreed to be paid, hence even if this Court should depart from its established rule, examine the evidence in this case and determine that gross negligence was found, plaintiff's recovery should nevertheless be limited to fifty dollars under this provision

of the contract. Plaintiff in error cannot be heard to argue that this regulation is unreasonable or the rate excessive, because as pointed out by the learned Trial Judge in his opinion in this case, if he makes such claims his remedy is before the Interstate Commerce Commission.

In the recent case of Klotz vs. Western Union Telegraph Company, 175 N. W. 825, the Supreme Court of Iowa upheld this provision, making the following statement in the course of its opinion:

“In *Western Union Tel. Co. vs. Compton*, 114 Ark. 193, 169 S. W. 946, it was held that the sendee was equally bound with the sender to the stipulations in the contract. See, also, *Poor vs. Western Union Tel. Co.*, 196 Mo. App. 557, 196 S. W. 28, in which the sendee sued. He sustained actual loss of \$712.50. The Court, however, held that the federal rule governed, and plaintiff was limited to the amount stipulated in the contract, and permitted him to recover but the \$50 so stipulated.

“We are not unmindful of the fact that State Courts, dealing with the subject-matter now under consideration, have reached different conclusions, but when the Supreme Court of the United States has spoken upon and given a construction to the acts of Congress the construction given controls the action of the State Courts. *When the Supreme Court says that the act of 1910 was intended to control telegraph companies, and when it says the act empowered*

telegraph companies to establish reasonable rates, subject to the control which the act to regulate commerce exerted, and when it says that the power thus given carries with it the authority to provide a rate and the right to fix a reasonable limitation of responsibility, bottomed on the rate, it follows that when the company proceeds upon that theory, fixes its rates and fixes the liability for negligence, bottomed on the rate, the liability fixed in the contract is the only liability to which the company can be subjected."

* * * * *

"A telegraph company has no way of knowing the value of a message, and has no way of knowing the extent of liability that may attach to a failure to transmit it at once. The sender is in a better position to know approximately the value of the thing sent and the damages that may flow from a failure to send it correctly. An agreement between the sender and the company as to the value of the message sent is tolerable when it serves as a basis both for charge and for liability. The charges are supposed to be commensurate with the risk assumed.

Other cases upholding the validity of this valuation clause expressly or by necessary implication are:

Western U. Tel. Co. vs. Compton, 114 Ark.
193, 169 S. W. 946.

Jacobs vs. Western U. Tel. Co., 196 Mo. App.
300, 196 S. W. 31.

- Postal Tel. Co. vs. Warren-Godwin L. Co., 251
U. S. 27, 64 L. Ed.
- Western U. Tel. Co. vs. Kaufman (Okla.),
162 Pac. 708.
- Cultra vs. Western U. Tel. Co., 44 Interstate
Commerce Reports, page 670.
- Western U. Tel. Co. vs. Schade, 192 S. W.
924.
- Bailey vs. Western U. Tel. Co., 97 Kan. 619,
156 Pac. 716.
- Kerns vs. Western U. Tel. Co., 198 S. W.
1132.
- Hartness vs. Western U. Tel. Co., 99 S. E.
759.

Similar valuation clauses under the Interstate Commerce Act have become common in bills of lading issued by railroad and express companies and they have been uniformly upheld. Thus in *Erie Railroad Co. vs. Stone*, 244 U. S. 332, 61 L. Ed. 1173, at page 1175, the Court states:

“In the case under consideration it appears that the reduced rates under which these horses were shipped and the limited liability arising from shipping under such reduced rates were fixed by the tariff schedules and the form of limited liability contract duly published and filed with the Interstate Commerce Commission, as required by law. These rates and that contract, which contained the notice requirement, thus became binding upon the parties until changed

by order of the Commission. This is too well settled to need discussion. The rules and regulations, duly published and filed, which in any wise affect the rates or the value of the service to be rendered, are controlling upon both parties to the shipping contract."

Numerous cases from the Supreme Court are cited in support of this rule and we call particular attention to the following cases from that Court:

Adams Express Co. vs. Croninger, 226 U. S. 491, 57 L. Ed. 314.

M. K. & T. Railway Co. vs. Harriman, 227 U. S. 657, 670, 57 L. Ed. 690.

C. C. C. & St. Louis Ry. Co. vs. Deitlebach, 239 U. S. 588, 60 L. Ed. 453.

Chicago, New Orleans, etc. Co. vs. Rankin, 241 U. S. 219, 60 L. Ed. 1022.

B. & M. R. R. Co. vs. Hooker, 233 U. S. 97, 58 L. Ed. 868.

Under these authorities the Trial Court very properly overruled defendant's objection to the introduction in evidence of the provisions of the telegraph blank as filed with the Commission and the approved rules and regulations of the company and very properly held that the provisions of the contract were binding on plaintiff in error as addressee of the telegram.

The wording of the valuation clause of the contract and the cases decided under it show clearly that even in case of gross negligence the liability of

the telegraph company is limited to the valuation placed upon it. There was nothing in this telegram to show whether plaintiff owned one or fifty shares of the bank stock, and as pointed out by the Trial Court, it was not an offer which could be turned into a contract by an acceptance from plaintiff. It was merely notice that a third party was willing to deal with plaintiff for his stock. It accordingly follows that if the sixty-day clause and the unrepeatd message clause are disregarded for any reason, plaintiff's recovery is nevertheless limited to fifty dollars.

PLAINTIFF'S TESTIMONY AS TO WHAT HE WOULD HAVE DONE WAS INADMISSIBLE.

Assignment of error No. 2 challenges the ruling of the Court in refusing to admit plaintiff's testimony that if he had received the telegram he would have accepted the offer contained in the message. The question on this point is found at page 73 of the transcript and defendant's objection is stated at length on pages 73 and 74. It appears that the testimony was received subject to the objection and that thereafter the Court sustained the objection to the above testimony (Tr. p. 75).

It is evident from the wording of the telegram that no offer was made plaintiff which he could accept so as to make a binding contract, and his statement that he would have sold is mere conjecture based on a contingency that never happened, and the authorities show that such evidence is generally considered to be contrary to public policy as tending to

encourage corrupt testimony. In *Western Union Telegraph Company vs. Hall*, 124 U. S. 44, 31 L. Ed. 479, and on page 483, the Court said:

“All that can be said to have been lost was the opportunity of buying on November ninth, and of making a profit by selling on the tenth, the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would certainly have taken place.”

In *Western U. Tel. Co. vs. Ferguson (Ind.)*, 54 L. R. A. 846 and on 849, the Court states:

“The plaintiff says he would have gone. But would he? The jury found so, as a fact, wholly from the plaintiff’s present opinion on a past condition of things that never existed, but is now summoned before the mind by conjecture. Thus the mental anguish doctrine not only departs from principle in regard to measuring compensatory damages, but also warps the rules of evidence, which forbid a witness to testify what he would or would not have done in a stated contingency.”

In *Hall vs. Western U. Tel. Co.*, 51 So. 819, 27 L. R. A. (N. S.), 639 and on 642, it is stated:

“The acceptance of the offer depended upon the independent will of the addressee and this contingency precludes recovery, even if the alleged loss of contemplated profits is susceptible of reasonably certain ascertainment.”

Such testimony is at most the mere opinion of the witnesses and relates to damages which are too remote, speculative and contingent to be recoverable.

Bass. vs. Postal Tel. Co., 127 Ga. 423, 53 S. E. 465.

Wilson vs. Western U. Tel. Co., 124 Ga. 131, 52 S. E. 153.

Western U. Tel. Co. vs. Webb, 48 So. 408.

The mere loss of a possible opportunity to make an advantageous contract is insufficient as a showing of damage by reason of the failure to receive a telegram.

Richmond H. Mills vs. Western U. Tel. Co., 123 Ga. 216, 51 S. E. 290.

Western U. Tel. Co. vs. Watson, 94 Ga. 202, 21 S. E. 457.

Beatty Lumber Co. vs. Western U. Tel. Co., 52 W. Va. 410, 44 S. E. 309.

Kiley vs. Western U. Tel. Co., 39 Hun. 158.
Affirmed in 109 N. Y. 231.

See additional cases cited *supra* under Brief of the Argument.

In the Richmond Mills case, *supra*, there was an offer to sell cotton yarn "delivery commencing in October". By an error in transmission the telegram read "delivery commencing in December". Testimony was offered to the effect that if the message had been transmitted correctly the offer would have been accepted and the Court, after quoting from the cases on the subject, said:

“So, in the present case, treating the contract as not completed, the contention is that an offer as received by the plaintiff was for December delivery, and that if it had been for October delivery it would have been accepted. There is little doubt that the plaintiff, or its vice-president, thinks now that it would have accepted the offer; but it is exceedingly speculative, as the basis for damages, to say that, if an offer had been received, the plaintiff would have accepted it, and would have derived certain advantages from it. While there is some evidence that the plaintiff placed an order at an advanced price, there is none as to how large an order was so placed, or how much the actual loss of the plaintiff was.”

In the Beatty Lumber case, *supra*, the telegram quoted a price on a certain quantity of lumber, but the telegram was not delivered and the question was the sufficiency of the evidence to show that the proposals would have been accepted. The Court says:

“To repel the argument that the acceptance of the proposals to sell in this case was uncertain and contingent, we are told that Elias stated, as a witness, that his firm would have accepted that proposal if it had been received. *This will not prove the fact.* That evidence does not make the fact certain. The opinion of this witness months afterward cannot go to that length. In *McCall vs. W. U. Tel. Co.*, cited, the

party to whom the telegram was addressed said that he would have accepted its proposal, but the Court said this did not change the nature of the matter. So, in *Smith vs. W. U. Tel. Co.*, cited, the jury found that if the telegram had been received, the party would have sold his stock, but the Court said, 'What a person might or would have done in a certain event is not the proper subject of a special finding, and will not be considered'."

In the *Watson* case, *supra*, the suit was based upon a claim that had the message been properly transmitted, plaintiff would have sold certain cotton gins to Pitner and Pitner testified that he would have accepted the offer. The Court says:

"In order to do this it would have been necessary to obtain the consent of Pitner, and Pitner might or might not have made the new arrangement with Watson. It is true, Pitner says now that he would have made it, but we cannot tell whether he would have done so or not. He might have been in a different state of mind then from the state of mind he was in at the trial of the case. He might have consented to it or might not have done so. On the whole, we think the damages are too remote and uncertain to be the basis of a recovery."

In the *Kiley* case, the message was an offer to buy of *Hilton & Waugh* a quantity of oil. *Hilton &*

Waugh were at liberty to reject the offer had the message been received. The Court said:

“But how can it be said with any degree of certainty that Hilton & Waugh would have accepted the plaintiff’s offer to purchase of them the quantity of oil mentioned? They were under no legal obligation to accept his proposition. The claim of the plaintiff that they would have done so is wholly speculative.”

The case at bar is stronger for the defendant than any of the cases above cited. The telegram, as pointed out, was not an offer in itself and plaintiff offered to prove by his own testimony that he would have sold the stock, but it appears from the evidence and as pointed out by the learned Trial Court this depended upon a number of contingencies. If plaintiff had received the telegram early Saturday morning, he says he would have sold the stock. The stock was collateral to a loan in the Security Bank of Oakland, according to his own testimony. If he had wished to sell the stock, would he have been able to secure it from the bank during banking hours on Saturday? If he had not secured the stock on that day, it could not have been obtained until after the bank opened on Monday, and it could not have reached Boise until December 6. At the close of business on the preceding day the Idaho National Bank carried an overdraft against the prospective purchaser of twenty-one thousand dollars and he never had enough money in the bank after that date

to pay for one-third of plaintiff's stock. Even if the stock had been secured and mailed to Idaho on December 1st, the day the telegram should have been delivered, there was still no binding contract for its purchase and there is no evidence in the record to show that David Miller would have accepted it or what is more to the point, that he would have paid plaintiff the cash price of forty-five hundred dollars asked for the stock. Under these circumstances and under the authorities above cited, we submit that the damages claimed are, as held by the Trial Court, too remote, speculative and contingent to be considered as a basis for recovery.

In this connection we note that plaintiff in error argues in his brief that this question is not within the pleadings because not raised as a special affirmative defense. But plaintiff alleged specifically in his complaint that Miller was ready and willing to buy the stock and plaintiff was ready and willing to sell the same, and that if the telegram had been delivered he would have sold the stock. (Paragraph VIII of the Complaint, Tr. p. 10.) In Paragraph VIII of the answer (Tr. pp. 17 and 18), it is specifically denied that Miller had the money or was ready or willing to buy the stock or that if the message had been received the plaintiff would have sold his stock to Miller or would have received therefor the sum of forty-five hundred dollars, or any other sum. Certainly these allegations and these denials must be held to raise an issue, and it was incumbent upon plaintiff to show by the strongest testimony

available that he could have obtained possession of the stock and forwarded it to Boise at a moment's notice. In face of these denials it cannot be said that plaintiff, who knew his stock was held as collateral security by the bank in Oakland, was taken by surprise and did not have an opportunity to call the bank officials and offer further inadmissible testimony as to what they would have done if plaintiff had asked to have his stock released some two years before.

We think the above argument demonstrates with sufficient clearness that the alleged bill of exceptions should be stricken from the transcript and that this Court should not in any event be required to examine into the sufficiency of the evidence to sustain the general finding in favor of defendant. We think further that in the event this Court takes the opposite view of these two questions, the provisions contained in the telegraph blank are binding upon the plaintiff and prevent his recovery and that the Trial Court properly excluded the evidence as to plaintiff's conjectural damages and properly held that no loss or damage had been shown.

Respectfully submitted,

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No. 3543

In the United States
Circuit Court of Appeals
For the Ninth Circuit

J. A. CZIZEK,

Plaintiff in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY,
a Corporation,

Defendant in Error.

**Brief of Plaintiff in Error on Motion to
Amend Judgment**

RICHARD H. JOHNSON and
CAREY H. NIXON,
Attorneys for Plaintiff in Error.

No. 3543

In the United States
Circuit Court of Appeals
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J. A. CZIZEK,

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vs.

WESTERN UNION TELEGRAPH COMPANY,
a Corporation,

Defendant in Error.

**Brief of Plaintiff in Error on Motion to
Amend Judgment**

RICHARD H. JOHNSON and
CAREY H. NIXON,

Attorneys for Plaintiff in Error.

Plaintiff in Error has filed a motion to modify or amend the order or judgment of this Court herein, to the extent only, of directing the District Court to enter a judgment in favor of plaintiff in error for the liquidated amount of the damages, in lieu of granting a new trial.

The case was tried by the Court and there was no dispute as to the facts, the only defenses raised and argued were as to the construction and effect of the

conditions contained in the telegraph blank as applied to the facts of the case, and whether such limitations applied to a case of gross negligence, etc.

The principle is the same as was applied by this Court in *Irvine v. Angus*, 35 C. C. A. 501, 93 Fed. 629, where the facts were agreed upon. On page 635, this Court said:

“All of the material facts having been agreed upon by the parties at the trial, as shown by the bill of exceptions, there is no necessity for a new trial of the action. In accordance with the views expressed in this opinion, the judgment will be reversed, and the cause is remanded to the Circuit Court, with directions to render judgment upon the admissions of the parties contained in the bill of exceptions, in favor of the plaintiff in error, for the sum of \$15,190.60, with legal interest thereon from May 21, 1884, and costs.”

This was the method followed by this Court in the cases against telegraph companies, involving the same condition of the record as in this case:

Western Union Tel. Co. v. Lange, 248 Fed. 656, 664;

Pac. Postal Tel. Cable Co. v. Fleischner, 66 Fed. 899, 910, where the Court said:

“As the amount in which the judgment is defective can be clearly ascertained from the findings and the judgment itself, I see no reason for reversing the judgment in toto, and sending the cause back for a new trial. In such cases the Court may direct the Circuit Court to enter such judgment as should have been entered under the

pleadings and findings. *Ft. Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. 56.

“The judgment as entered by the Circuit Court is reversed, and the cause remanded to that Court, with direction to enter a judgment for the plaintiffs in that Court, against the defendant therein, for the sum of \$3,704.37, and costs of suit, taxed at.....”

In *Swan v. Western Union Tel. Co.*, 129 Fed. 318, 323, the Circuit Court of Appeals for the Seventh Circuit, under like conditions, made the following order:

“The judgment of the Court below is reversed and judgment ordered in favor of the plaintiff in error for the sum of \$1,050 with interest from the 2nd day of May, 1901, besides costs.”

Under the Act of March 3, 1891, C. 517, Sec. 11, 26 Stat. 829, Comp. Stat. 1913, Sec. 1651, Barnes Fed. Code, Sec. 1407, 6 Fed. Stat. Ann., p. 234, the Circuit Court of Appeals is vested with power in a case tried without a jury, where the facts are undisputed to direct the entry of the proper judgment.

United States v. Illinois Surety Co., (C. C. A. 7th Cir.) 226 Fed. 653, 664. On the latter page, the Court said:

“It is, however, urged that, dealing with the case as an action at law, this Court is without power to modify the judgment of the District Court, and can only remand with directions to award a new trial. The objection is without merit. This Court is vested with power to

modify, as well as to affirm or reserve, any judgment of the District Court (R. S. Sec. 701, Comp. St. 1913, Sec. 1669) ; Act March 3, 1891, c. 517, Sec. 11, 26 Stat. 829 (Comp. St. 1913, Sec. 1651) and in a case tried without a jury, where the findings of fact made by the Court are undisputed, as well as when they are agreed upon by the parties, as in *Thomas v. Matthiessen*, 232 U. S. 221, 34 Sup. Ct. 312, 58 L. Ed. 577, the proper judgment may be rendered thereon in the appellate tribunal after a reversal of the judgment of the Trial Court. See, too, *Ins. Co. v. Boykin*, 12 Wall. 433, 20 L. Ed. 442; *Ins. Co. v. Piaggio*, 16 Wall. 378, 21 L. Ed. 358."

In *Oliver v. Mt. Union Tanning & Extract Co.*, (C. C. A. 3d Cir.) 264 Fed. 601, 608, the Court on a "Petition for Limited Rehearing and Motion for Entry of Final Judgment," on page 608 said:

"We have no doubt that we have the power to direct such a judgment to be entered as the pleadings and the special finding of facts of the Court below require. See, in addition to the cases cited in the opinion heretofore filed, *Allen v. St. Louis Bank*, 120 U. S. 20, 40, 7 Sup. Ct. 460, 30 L. Ed. 573; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 264, 7 Sup. Ct. 882, 30 L. Ed. 920; *Redfield v. Parks*, 132 U. S. 239, 252, 10 Sup. Ct. 83, 33 L. Ed. 327."

In *Rathbone v. Board of Commissioners*, (C. C. A. 8th Cir.) 83 Fed. 125, in a similar case the judgment of the lower Court was reversed and the cause remanded for a new trial.

A motion similar to the one in this case was filed

to modify the judgment. The Court on page 132 said:

“Per Curiam. A motion has been made in this case to modify the judgment heretofore entered in this Court in pursuance of the opinion on file, and to modify the mandate to be issued thereunder so as to direct the Circuit Court to enter a judgment in favor of the plaintiff below, in lieu of granting a new trial. The motion is based on the ground that as a jury was duly waived, and the case was tried on an agreed statement of facts, and the damages recoverable are a liquidated sum, there is no occasion for a second trial. We are satisfied that the motion is well founded, on the following cases: *Ft. Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. 56; *Allen v. Bank*, 120 U. S. 20, 7 Sup. Ct. 460; *Rolling Mill Co. v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. 882; *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. 83; *Saltonstall v. Russell*, 152 U. S. 628, 14 Sup. Ct. 733. Therefore, the judgment will be modified as prayed, and the Circuit Court will be directed to enter a judgment against the defendant county in the sum \$3,831.60, with interest thereon at the rate of 6 per cent. per annum from July 1, 1894, to the date of entry.”

In *Fellman v. Royal Ins. Co.*, (C. C. A. 5th Cir.) 184 Fed. 577, the Court held:

“Where, in an action on an award, pursuant to a fire policy, a reversal was required because of an error of the Trial Court in disposing of a question of law and there was no disputed question of fact in the case, the Court of Appeals would render final judgment, instead of remanding the cause for a new trial.”

In the late case of *Walker v. Gulf & I. Ry. Co.*, 269 Fed. 885, 891, advance sheets Apr. 7, 1921, the Circuit Court of Appeals of the Fifth Circuit, on page 891, said:

“This case being tried by the Court, and the facts being agreed upon and specially found by the Court, there is no reason for remanding the case for a new trial; but the judgment rendered can be directed to be modified in accordance with the above ruling as to the advances made by the Railway to the Terminal Company. *Fellman v. Royal Ins. Co.*, 184 Fed. 577, 106 C. C. A. 557; *Fort Scott v. Hickman*, 112 U. S. 150, 165, 5 Sup. Ct. 56, 28 L. Ed. 636.”

The case of *Bayne v. United States*, (C. C. A. 8th Cir.) 195 Fed. 236, is very analogous to this case because there the erroneous construction of a contract caused the Court to make a finding of fact which was not correct. The Court of Appeals recognized the fact, as contended by the defendant in error here, that it was without power to find the facts, but held that it had power to correct the erroneous finding by correctly construing the contract and to render judgment accordingly, without a new trial.

In the case at bar there was no evidence introduced by defendant in the Court below to controvert plaintiff's proof and this proof with the admissions in the answer clearly established the allegation of the complaint. Consequently there was no necessity for special findings, the only questions being questions of law. Nevertheless, the Court, in his opinion, pur-

ported to make certain findings to which plaintiff was allowed exceptions both on the ground that they were not sustained by the evidence and were against law. Examples of such so-called findings are that the promise of defendant's district superintendent at Salt Lake to investigate and report, was made without waiving the defense that the claim was barred by the 60-day clause (Tr. p. 110). Plaintiff was allowed an exception on the ground that the finding was not supported by the evidence and is against law. The evidence on this point consisted of the letter written by Mr. Life, the district superintendent, and its construction was a question of law only. So it is with the statement of the Court on page 111, "that the evidence is insufficient to support a finding that plaintiff suffered any damages as a result of his failure to receive the telegram," etc. This was clearly a matter of law, since there was no dispute as to the facts. This is true of all the so-called findings. They amount merely to conclusions of law upon which this Court took a different view from that of the Court below.

For the foregoing reasons we submit that the judgment and order of this Court reversing the judgment of the District Court should stand, with directions to enter judgment in favor of plaintiff in error for forty-five hundred dollars (\$4,500.00) and interest from December 1, 1917, which is the date plaintiff would have received the telegram and made the sale

of his stock, if the telegram had been sent and delivered.

Respectfully submitted,

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No. 3543

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

J. A. CZIZEK,

Plaintiff in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY,
a Corporation,

Defendant in Error.

**PETITION OF DEFENDANT IN ERROR
FOR REHEARING**

UPON WRIT OF ERROR FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
IDAHO, SOUTHERN DIVISION

BEVERLY L. HODGHEAD,
RICHARDS & HAGA,
Attorneys for Petitioner.

FRANCIS R. STARK, of New York,
Of Counsel.

J. A. CZIZEK,
vs.
WESTERN UNION TELEGRAPH
COMPANY, a corporation,

Plaintiff in Error,
Defendant in Error.

No. 3543

UPON WRIT OF ERROR FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
IDAHO, SOUTHERN DIVISION

Your petitioner, Western Union Telegraph Company, defendant in error in the above-entitled cause, respectfully petitions this Honorable Court to grant a rehearing in said cause, and as the basis of such petition your petitioner respectfully shows:

- I. That this Honorable Court erred in holding that the Act of Congress regulating interstate tele-

raphy, and the stipulations and agreements made in pursuance thereof, have no application in the case of failure of transmission.

2. That this Honorable Court erred in holding that the *value of the message agreed upon for rate making purposes*, as authorized by the Act of Congress, is void in the case of non-transmission, or that the value of the message agreed upon as a basis of the rate is dependent or conditioned upon partial transmission.

3. That this Honorable Court erred in reviewing the evidence, and finding gross negligence in an action at law, where there was no request for special findings, and no motion for judgment or request for a ruling or declaration of law on the sufficiency of the evidence.

The first two propositions may be discussed together, and in this particular petitioner earnestly contends:

THE CLASSIFICATION OF INTERSTATE MESSAGES WITH
RESPECT TO VALUE IS EXPRESSLY AUTHORIZED BY
THE ACT OF CONGRESS AND HAS NOW BEEN DE-
CIDED BY THE SUPREME COURT TO BE VALID.

This Honorable Court held that the agreement between the sender of the message and the telegraph company, printed upon the message blank, has no application where the message fails at the originating

office. The decision is based largely upon the following cases:

Postal Tel. Co. v. Fleischner, 66 Fed. 899;
Candee v. W. U. Tel. Co., 34 Wis. 471;
U. S. Telegraph Co. v. Wenger, 55 Pa. St. 262;
W. U. Telegraph Co. v. Cook, 61 Fed. 624;
Swan v. W. U. Telegraph Co., 129 Fed. 318;
Postal Tel. Co. v. Nichols, 159 Fed. 643.

We respectfully urge that all of the above cases were decided before the amendment to the Interstate Commerce Act of June 18, 1910, by which Congress took over and occupied the regulation of the entire field of interstate commerce by telegraph, and also before the introduction of the valuation clause into the message contracts *adjusting the rate to the responsibility assumed*, which agreement has no relation to the fact of transmission itself. Prior to the adoption of the amendment to the Interstate Commerce Act and its interpretation by the Supreme Court in the recent case of *Postal Telegraph v. Warren Godwin Lumber Co.*, referred to in the opinion of the Court, there was much conflict among the various State Courts, and also among the Federal circuits as to the effect of the unrepeatd message clause of the contract in cases where there was no mistake in verbiage, but where the message failed in transmission or delivery. The authorities above cited are the ones which were usually relied upon as holding that the

condition of the message contract was void. "On the other hand," as stated by the Interstate Commerce Commission in *Cultra v. Western Union Tel. Co.*, 44 I. C. C. Rep. 670, "the defendant cites an equal number of cases in which courts of great authority have upheld the restrictive rates." It is this lack of uniformity, says the Commission, which explains "the legislation by which the Congress has put *all telegraph and telephone companies engaged in interstate transmission of messages under our jurisdiction.*"

Then says the Commission:

"But whatever may have occasioned the amendatory legislation, one of its necessary consequences, under the language used, has been to put an end to this diversity in results; so that, as will be seen further along in this report, the charge as fixed and offered to the public by the defendant for transmitting an interstate message may no longer involve any greater or less liability in one forum than it does in another, but must be construed as attaching to the defendant's error the same degree of responsibility in all the courts."

In *Western Union v. Lange*, this Court approved the former line of authorities and held that the un-repeated message clause applied only to errors in transmission. (There was no valuation agreement involved in that case as that clause *was* not introduced into the contract until after the Act of Congress.) Upon this conflict in authorities concerning the un-repeated message clause, the Supreme Court granted the certiorari in *Western Union v. Lange*, and while

the point was not decided in that case it was determined in the *Warren Godwin* case, *supra*, decided at the same term, in which the Court held that the different rates were not fixed as a basis alone for the service rendered, *but for the responsibility exacted for its performance*.

This Court, in its opinion in the present case, refers to "the absence of a controlling decision." We respectfully urge that the controlling decision is found in the *Warren Godwin Lumber* case, *supra*, and in the cases expressly approved therein. The Court there was not only reviewing the decision of the Supreme Court of Mississippi in that particular case, but also the decision of the same Court in *Dickerson v. Western Union Tel. Co.*, 114 Miss. 115, in which the Postal Telegraph Co. was also a defendant. In that case there was no error in transmission, but the message failed of prompt delivery, and the Postal Telegraph Co., the other defendant, *had rendered no service whatever* other than receiving the message. The complaint also charged gross and willful and wanton negligence. The Supreme Court of Mississippi, as said by Chief Justice White, "held that the Act of Congress of 1910 had not extended the power of Congress over the rates of telegraph companies for interstate business *and the contracts made by them as to such subject*." The Supreme Court of the United States in reversing this holding, says:

"For the sake of brevity we do not stop to review the cases which perturbed the mind of the

Court in the *Dickerson* case as to the correctness of its ruling in the *Showers* case (citing cases), but content ourselves with saying that we are of the opinion that the effect so given to them was a mistaken one."

The case of *Norris v. Western Union Tel. Co.*, 174 N. C. 92, which is among the cases expressly approved in the *Warren Godwin* case and on which the Court in part bases its opinion, was a case of *failure to deliver*. The Supreme Court in the *Warren Godwin* case did not undertake to specify the particular cases in which the message contracts applied, but in effect held that Congress by the Act of 1910 has occupied the *entire field* and extended the power of Congress over the rates of telegraph companies for all interstate business and all contracts made by them as to such subject, and has vested the power to determine the reasonableness of the *rates, rules, contracts and practices* of such interstate telegraph companies in the first instance in the Interstate Commerce Commission.

THE VALUATION CLAUSE IN THE MESSAGE CONTRACT

The above relates to the unrepeatd message clause of the contract, but we repeat here the *valuation clause* used and agreed upon by the parties *for rate-making purposes*:

"2. In any event the company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the

We respectfully call the Court's attention to the following authorities omitted from our petition for rehearing. They hold that the fifty dollar valuation clause is valid, notwithstanding gross negligence.

Frederick v. Western Union Tel. Co.,
179 N.W. 934,
Donlon Bros. v. Southern Pacific Co.,
151 Cal. 763 (See pages 766-770.
Dunham v. Western Union Tel. Co.,
102 S.E. 113,
Western Union v. Albert, 86 So. 760,
Klotz v. Western Union, 175 N.W. 825.

In the Frederick case there was failure of delivery and gross negligence. In the opinion based upon the recent Federal authorities the Court said, page 936:

"Where the telegraph company is grossly negligent it may be made to respond for such negligence beyond the price of sending the telegram but not to exceed \$50."

also (page 936) that it is

"settled that it cannot be urged collaterally that such provisions are unreasonable and that such attack must be done by direct proceedings before the Interstate Commerce Commission."

negligence of its servants or otherwise, beyond the sum of Fifty Dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof."

The above provision of the contract has no relation to the *degree* of negligence nor to the place where the negligent act occurred. On the contrary, it assumes the fact of negligence. This clause was not involved in any of the decisions cited by the Court in its opinion in this case and referred to in the beginning of this petition. Those cases, as stated, were decided before the Act of Congress was amended in 1910 and before there was any valuation clause in the contract. The clause is expressly authorized by the Act of Congress wherein it is provided that telegraph messages may be classified into *repeated* and *unrepeated messages*, etc., "*and such other classes as are just and reasonable*, and different rates may be charged for the different classes of messages." This particular form of valuation clause of the contract was held to be reasonable and valid by the Interstate Commerce Commission in *Cultra v. Western Union Tel. Co.*, 44 I. C. C. Rep. 670, in *Bailey v. Western Union Tel. Co.*, 97 Kan. 619, and *Western Union Tel. Co. v. Schade*, 137 Tenn. 214, which decisions were expressly approved by the Supreme Court in the *Warren Godwin* case, *supra*. The liability of the telegraph

company in this case, as in all cases, attached not when the message was placed upon the wire for transmission *but when the message was filed and the contract was made*. Upon a review of the decision of the Supreme Court in the *Warren Godwin* case, and in *Western Union v. Boegli*, 251 U. S. 315, and of the various State Court decisions approved therein, we can see no escape from this conclusion. Otherwise the power of Congress has not been extended over the entire field of interstate commerce by telegraph, and it has not been wholly placed under the administrative control of the Interstate Commerce Commission as the Supreme Court says in the two cases above referred to is so clearly established.

THE MEASURE OF DEFENDANT'S LIABILITY UNDER THE VALUATION CLAUSE OF THE CONTRACT IS BASED UPON THE RATE PAID AND BECOMES FIXED WHEN THE CONTRACT IS MADE.

In the *Cultra* case, the Interstate Commerce Commission bases its opinion largely upon the "Express Cases" construing similar contracts. It says:

"The sender of a telegram occupies much the same position as the consignor of any express package. In neither case is the value of that which is offered for transmission or transportation known to the carrier. In the case of a telegram, if the carrier is to assume the same degree of risk that is assumed by the express company under similar circumstances, the rate demanded is the repeated message rate, under which the liability of the carrier is limited to the sum of

\$50, unless a greater value is declared. For a greater value an additional charge must be paid. The same limitation of value is observed in the form of express receipt prescribed in *Express Rates, Practices, Accounts, and Revenues*, 28 I. C. C., 132, 137, where it is said:

"The classification prescribed provides for valuation charges upon articles of higher value. In the case of shipments of extraordinary value, not only is the carrier entitled to notice of such value in order that its care may be increased, but it is also entitled to extra compensation for the increased liability and care."

"As before stated, the charge established by the defendant for the transmission of messages valued at more than \$50 is one-tenth of 1 per cent of the excess value in addition to the repeated message rate. This special charge is the same as that found reasonable by us for a like liability in the transportation of express packages, and is the usual insurance charge on shipments conveyed by parcel-carrying systems in other countries. *In re Express Rates, Practices, Accounts and Revenues*, 24 I. C. C., 380, 397."

THE RULE IN RAILROAD AND EXPRESS CASES ARE THE SAME AS WITH TELEGRAPH COMPANIES IN INTERSTATE BUSINESS

The Supreme Court has held a similar valuation clause valid in all the recent cases relating to express companies and railroads. The principal cases are:

Adams Express Co. v. Croninger; 226 U.S. 491
Kansas City v. Carl; 227 U.S. 639
Missouri Ry. v. Harriman; 227 U.S. 657
Wells Fargo v. Neiman-Marcus Co. 227 U.S. 469

In all these cases it is held that the shipper is limited in the case of the loss of the goods to the value declared as a basis of rates without regard to the place where the negligent act occurred. The Supreme Court in its approval of the *Cultra* case has applied this doctrine to telegraph companies. *Adams Express Co. v. Croninger, supra*, is the first and leading case on the subject, and will be found cited and approved at almost every term of court since it was decided in 1912. There the action was to recover the full market value of a package containing a diamond ring, which was delivered by the plaintiff below to the express company at its office in Cincinnati, Ohio, consigned to Augusta, Georgia.

"The package was never delivered." The Court does not inquire whether the ring was lost at Cincinnati, Ohio, or at Augusta, Georgia, or at some intervening point. It simply holds that the contract declaring the value of the property fixed upon as a basis of the rate is valid, and determined the measure of damage in case the package was never delivered. In that case the valuation was \$50. The clause of the contract was in substance the same as the contract here. Inasmuch as it is not dependent upon service, but is an agreement as to value in case the property is lost, it was immaterial to the case what was the degree of negligence or whether the package was lost at the *originating point or the point of destination*.

We respectfully call the Court's attention to the

following paragraphs of the opinion which we contend are controlling:

"It has therefore become an established rule of the common law, as declared by this Court in many cases, that such a carrier may, by a fair, open, just and reasonable agreement, limit the amount recoverable by a shipper *in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk.*"

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. *The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.*"

In *Wells Fargo v. Neiman-Marcus Co.*, 227 U. S., the action was to recover from the express company

the loss of a package of furs "shipped from New York to Dallas, Texas, *and never delivered.*" The agreement as to value in case of loss was substantially the same as in this case. The Court determines that in the case of loss the shipper is held to that declared value. The Court said:

"The rate of freight was based upon the valuation thus fixed, and the liability should not exceed the amount so made the rate basis."

Upon this holding the judgment was reversed. There is no discussion as to whether the package was lost at the receiving office or at some intermediate point.

In the present case the agreement is that the value of the message does not exceed \$50, and the company shall not be liable beyond that sum in case of *non-delivery*. The message was never delivered. Its value could not be affected by the fact that it failed at one office instead of another. It is further agreed that for any additional value or risk which the telegraph company assumes, the sender of the message shall pay a sum on such value "equal to one-tenth of one per cent thereof." On the claimed value of \$4500, therefore, the additional rate which any user of the telegraph would have been required to pay under the rules established in accordance with the Act of Congress was \$4.50. The sender of the message did not pay this rate, but paid the lower rate, yet plaintiff claims the same value as one who had paid the full

rate. We earnestly contend that the decision of the Court *destroys the uniformity which it was the purpose of the Interstate Commerce Act to establish.*

AFTER THE SENDER HAS DECLARED THE VALUE IN ORDER TO SECURE THE RATE WHICH CORRESPONDS THERETO THAT VALUE CANNOT BE AFFECTED BY SHOWING THAT THE NEGLIGENT ACT OCCURRED AT THE INITIAL POINT.

We invite the Court's attention to this situation to show that after the message was filed and the value agreed upon in case of loss and the rate fixed in accordance with the measure of liability thus assumed, it is immaterial whether the message failed at the originating office or the office of destination or at some intervening point. Assume that at the time this message was filed at Boise to be transmitted to Oakland, a similar message was filed at Oakland to be transmitted to Boise, and that the latter message *was* transmitted to Boise and both messages there came into the possession of the same clerk and through his negligence, gross or otherwise, both messages were misplaced and lost, each message having been valued at fifty dollars and both senders having paid the same toll. Can the Court consistently with the purpose of the Act of Congress to establish uniformity of rates for the same degree of responsibility as stated by the Supreme Court in the *Warren Godwin* case and by the Interstate Commerce Commission in the *Cultra* case, hold that the

company would be liable for a greater sum than the declared value in one case and not the other, although the negligence in each case was the same act?

WE EARNESTLY CONTEND:

1. That under the valuation clause of the contract the liability of the company to the extent of the value declared in case of loss attaches when the message is filed and the contract is made; that if the message is never delivered it is immaterial to the sender at what point on the company's lines the failure occurred.

2. That this contract fixing a value upon the message is not a limitation of liability, but is a classification of messages for rate making purposes, under which the sender, having secured the lower rate, is stopped from seeking to recover more than the declared value of his message.

3. That if one user of the telegraph, on account of larger declared value, pays \$4.50 more than another user pays for the same message and the higher responsibility assumed, and yet in the event of loss for any reason or at any place, both senders are permitted to recover the same high value, there is a discrimination between the two and the violation of the express terms of the Interstate Commerce Act.

4. That a telegram or a package to be transmitted from one State to another is in interstate com-

merce and subject to the regulation of the Interstate Commission as soon as it is filed with the carrier and contract of transmission or bill of lading is made. If the contract respecting the value of the message in suit here, though valid, has no application in the present case, then some messages filed in interstate commerce are controlled by the Act of Congress and the regulations of the Interstate Commission, and some messages are not. We respectfully urge that the decision of the Court in this respect is erroneous.

THE AUTHORITY TO DETERMINE THE REASONABLENESS AND APPLICATION OF ALL REGULATIONS AFFECTING INTERSTATE TELEGRAMS HAS BEEN VESTED BY THE ACT OF CONGRESS IN THE INTERSTATE COMMERCE COMMISSION.

The Court here held that this contract is invalid in case of failure of transmission. It must, however, be admitted that the language of the contract is sufficiently comprehensive to cover this case, for it provides that where the rate is such as was paid for the message involved, the company in case of non-delivery shall not be liable beyond the declared value of fifty dollars, which corresponds to that rate. The message, through the negligence of the defendant, was not delivered. The company was therefore liable for the declared value. But, says the Court, the contract is unreasonable and against public policy when

sought to be applied to cases of total failure of transmission. We contend it is not competent for the Court to so determine the unreasonableness of the regulation. It will be remembered the Supreme Court expressly approved the case of

Gardner v. Western Union Tel. Co., 231 Fed. where it is said, page 412:

“Whether the regulation is a reasonable one or not, is, in our judgment, a question for the Interstate Commerce Commission to determine.”

(Citing numerous decisions of the Supreme Court.)

In *Williams v. Western Union Tel. Co.*, 203 Fed. 140, the Court said (page 145):

“The question (the reasonableness of the regulation) must be first raised before the Interstate Commerce Commission.”

“We refer the Court on this point to our former Brief, at pages 57-61.

THE SIXTY-DAY CLAUSE OF THE MESSAGE BLANK.

In holding that the written stipulations upon the back of the telegraph message blank do not apply in case of total failure of the transmission the Court would seem to have overlooked the provision of paragraph 6 on the telegraph blank, which is as follows:

“The company will not be liable for damages or statutory penalties *in any case* where the claim

is not presented *in writing* within sixty days after the telegram is filed with the company for transmission."

This clause in its terms applies to all cases, or, as its language specifies, in any case. It has been held to be valid by the Interstate Commerce Commission, the Federal Courts and the Supreme Court. See

Gardner v. Western Union Tel. Co., 231 Fed. 405,

approved in *Postal Tel. Co. v. Warren Godwin Lumber Co.*, 251 U. S. 27. See also our former Brief pages 62-70. Under these authorities the sixty-day clause applies in cases of failure to transmit and in cases of gross negligence, and as it is conceded that notice in writing of the claim was not given, the judgment should have been affirmed upon this ground.

THE COURT ERRED IN REVIEWING THE EVIDENCE.

Respecting this third basis of this petition for rehearing your petitioner respectfully shows:

1. That this Honorable Court erred in reversing the Trial Court and ordering a new trial for *errors in fact*.
2. That this Honorable Court erred in *reviewing the evidence* and holding the same *insufficient* to support the general finding in favor of defendant in error.

3. That this Honorable Court apparently overlooked the fact that this was an action at law tried by the Court and that no request for special findings, no motion for a judgment, and no request for a ruling or declaration of law upon the sufficiency of the evidence was made in the Trial Court by either party, but this Court examined and determined the case as if such a motion or request had been made and as if the Court was free to determine from the whole evidence whether or not it sustained the general finding and judgment in favor of defendant in error.

4. That this Honorable Court erred in treating the statements in the opinion of the Trial Court filed in this case and contained in the Transcript as special findings of fact.

5. That this Honorable Court erred in holding and deciding, notwithstanding the general finding in favor of this plaintiff and the absence of any motion for judgment or similar motion or request, that the evidence was *sufficient* to show a case of *gross negligence* against your petitioner for failure to transmit and deliver the telegram involved in this action.

6. That this Honorable Court erred in holding and deciding, notwithstanding the general finding in favor of your petitioner, and in the absence of any motion for judgment or similar motion or request, that the *evidence was sufficient* to sustain the contention of plaintiff in error that he would have sold the bank stock mentioned in the telegram if he had re-

ceived the message, and that he would have received the price mentioned therein for such stock.

7. That this Honorable Court apparently overlooked the fact that under the issues raised by the pleadings and in view of the general finding in favor of your petitioner, that the holding of the Trial Court that *plaintiff in error had not shown that he could and would have delivered his stock*, which was pledged in an Oakland bank as collateral, *was sufficient to sustain the judgment*.

8. That this Honorable Court erred in holding and deciding, notwithstanding the general finding in favor of your petitioner and in the absence of any motion for judgment or similar motion or request, that plaintiff in error suffered any damage for your petitioner's failure to transmit and deliver the telegram in question.

9. That this Honorable Court apparently assumed that the time for preparation of a bill of exceptions in said cause had not expired on June 5, 1920, when petition for new trial by plaintiff in error was filed, and on June 17, 1920, when the order extending the time for preparing such bill of exceptions to July 8, 1920, was made.

10. That this Honorable Court erred in holding and deciding that the clause of the contract of transmission requiring notice of claim within sixty days from the filing of the message for transmission did

not apply in cases where the telegram was not transmitted at all.

ARGUMENT

This was a law action tried by the Court without a jury, pursuant to written stipulation of the parties (Tr., page 55). There are no special findings, but the judgment contains the following:

“The Court having heard the evidence, oral and documentary, introduced by the respective parties, and being fully advised in the premises, finds, concludes and decides in favor of defendant” (Tr., p. 43).

There was no motion for judgment by either party during the trial or at any time, no request for a declaration of law, and no other motion or request bringing before the Trial Court the sufficiency of the evidence, but nevertheless *this Court has reviewed the evidence fully, passed upon its sufficiency as if such a motion or request had been made, and reversed the judgment below on the ground that the evidence was sufficient to show gross negligence on the part of defendant in error, that plaintiff in error would have sold his stock if he had received the telegram, and that he would have received the price mentioned in the telegram for such stock.*

In passing upon the sufficiency of the evidence in this state of the record, without mentioning the fundamental rules of practice laid down by the Federal Statutes and a long line of decisions in the Supreme

Court of the United States and the Circuit Courts of Appeal of the various circuits, including this Court, we are forced to the conclusion that this Court overlooked the points raised in the Brief of defendant in error at pages 11 and 12 and 38-42 inclusive, and assumed that there was some motion or request calling for a declaration or ruling from the Trial Court as to the sufficiency of the evidence which was contained in the bill of exceptions. There was no such request or motion made at the trial and the bill of exceptions shows conclusively this fact, and nothing is clearer than that a Federal Appellate Court cannot review the evidence in an action tried by the Court and reverse the lower Court because it considers such evidence insufficient to support a general finding in favor of the defendant in error.

Section 1011 of the United States Revised Statutes originally enacted in the Judiciary Act of 1789, provides as follows:

“There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the Court, *or for any error in fact.*”

Under the Circuit Court of Appeals Act this section applies to the Circuit Courts of Appeal. See

Hall v. Houghton etc. Merc. Co., 8 C. C. A. 661, 60 Fed. 350;

United States Fidelity etc. Co. v. Woodson County, 76 C. C. A. 114, 145 Fed. 144.

In *Pennsylvania Casualty Company v. Whiteway*, 127 C. C. A. 332, 210 Fed. 782, and at page 784, this Court said:

"When an action at law is tried before a jury, their verdict is not subject to review unless there is absence of substantial evidence to sustain it, and even then it is not reviewable unless a request has been made for a peremptory instruction, and an exception taken to the ruling of the Court. When a jury is waived, and the cause is tried by the Court, the general finding of the Court for one or the other of the parties stands as the verdict of a jury, and may not be reviewed in an Appellate Court unless the lack of evidence to sustain the finding has been suggested by a request for a ruling thereon, or a motion for judgment, or some motion to present to the Court the issue of law so involved, before the close of the trial. *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; *Wilson v. Merchants' Loan & Trust Co.*, 183 U. S. 121, 22 Sup. Ct. 55, 46 L. Ed. 113; *Boardman v. Toffey*, 117 U. S. 271, 6 Sup. Ct. 734, 29 L. Ed. 898; *Barnard v. Randle*, 110 Fed. 906, 49 C. C. A. 177; *United States Fidelity & G. Co. v. Board of Com'rs*, 145 Fed. 144, 76 C. C. A. 114; *Felker v. First Nat. Bank*, 196 Fed. 200, 116 C. C. A. 32; *Bell v. Union Pac. R. Co.*, 194 Fed. 366, 114 C. C. A. 326. There was no such request or motion made in the case in hand, and the judgment of the Court below is therefore conclusive of the facts determined thereby."

In *Wear v. Imperial Window Glass Co.*, 139 C. C. A. 622, 224 Fed. 60, the Circuit Court of Appeals for the Eighth Circuit, speaking through Judge Sanborn, said at pages 62 and 63:

"This case was argued and submitted on the supposition that there were exceptions to rulings of the Court below upon questions of law and an assignment of errors which presented some legal question to this Court for review, but a reading of the record and the briefs subsequently disclosed the fact that this was a mistake. The only question the specifications of error attempt to present is whether or not the evidence, which is conflicting, sustains the finding and judgment of the Court. They invite this Court, in other words, to retry this case and to determine whether or not under the applicable law the weight of the evidence sustains the finding and judgment. But the case was tried by the Court below without a jury, and its decision of that issue is not reviewable in this Court. It is, like the verdict of a jury, assailable only on the ground that there was no substantial evidence in support of it, and then it is reviewable only when a request has been made to the Trial Court before the close of the trial that it adjudge, on the specific ground that there was no substantial evidence to sustain any other conclusion, either all the issues or some specific issue in favor of the requesting party. No such request was made in this case and the specifications of error, therefore, present no question reviewable by this Court. When an action at law is tried without a jury by a Federal Court, and it makes a general finding, or a special finding of facts, the Act of Congress forbids a reversal by the Appellate Court of that finding, or the judgment thereon, 'for any error of fact' (Revised Statutes, Sec. 1011, U. S. Comp. Stat. 1913, Sec. 1672, p. 700), and a finding of fact contrary to the weight of the evidence is an error of fact.

"The question of law whether or not there was any substantial evidence to sustain any such find-

ing is reviewable, as in a trial by jury, only when a request or a motion is made, denied and excepted to, or some other like action is taken which fairly presents that question to the Trial Court and secures its ruling thereon during the trial."

In the case of *Dooley v. Pease*, 180 U. S. 126, 45 L. Ed. 457, at page 460, the Court states:

"Where a case is tried by the Court, a jury having been waived, its findings upon questions of fact are conclusive in the Courts of Review, it matters not how convincing the argument that upon the evidence the finding should have been different."

Under the original Judiciary Act no review whatever was provided in cases tried before a Federal Court by agreement, and this point was taken care of by Section 4 of the Act of March 3d, 1865, now contained in sections 649 and 700 of the Revised Statutes, which, however, did not repeal section 1011, *supra*. Section 649 is as follows:

"Issues of fact in civil cases in any Circuit Court may be tried and determined by the Court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the Court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

Section 700 Revised Statutes is as follows:

"When an issue of fact in any civil cause in a Circuit Court is tried and determined by the Court

without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the Court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and *when the finding is special* the review may extend to the determination of the sufficiency of the facts found to support the judgment."

The purpose of these sections is admirably stated by the Supreme Court in the case of *Martinton v. Fairbanks*, 112 U. S. 670, 676, 28 L. Ed. 862, where the Court, after fully reviewing the authorities, says at page 864:

"The 4th section of the Act of March 3, 1865, was passed to allow the parties, where, a jury being waived, the cause was tried by the Court, a review of such rulings of the Court in the progress of the trial as were excepted to at the time and duly presented by bill of exceptions; and also a review of the judgment of the Court upon the question whether the facts specially found by the Court were sufficient to support its judgment. In other respects the old law remained unchanged. In the present case, the bill of exceptions presents no ruling of the Court made in the progress of the trial, and there is no special finding of facts. The general finding is conclusive of the issues of fact against the plaintiff in error, and there is no question of law presented by the record of which the Court can take cognizance."

In *United States Fidelity etc. Co. v. Woodson County*, 76 C. C. A. 114, 145 Fed. 144, the Circuit

Court of Appeals for the Eighth Circuit, at pages 150 and 151, said:

"The acts of Congress provide that 'there shall be no reversal in the Supreme Court upon a writ of error . . . for any error in fact' (Rev. St. Sec. 1011 (U. S. Comp. St. 1901, p. 715)); and this provision of the statute governs the Circuit Court of Appeals (*Hall v. Houghton, etc., Co.*, 60 Fed. 350, 8 C. C. A. 661).

"In the trial of an action by the Court without a jury the rulings of the Court in the progress of the trial, and those only, are open to review. The true test for determining whether or not a question or ruling in a trial by the Court without a jury is reviewable is the answer to the question whether or not it would have been open to review if the trial had been to a jury.

"The question whether or not at the close of a trial there is substantial evidence to sustain a finding in favor of a party to the action is a question of law which arises in the progress of the trial. In a trial to a jury it is reviewable on an exception to a ruling upon a request for a peremptory instruction. In a trial by the Court without a jury it is reviewable upon a motion for a judgment, a request for a declaration of law, or any other action in the Trial Court which fairly presents this issue of law to that Court for determination before the trial ends.

"No motion, request or act of this nature is recorded in the case in hand, so that the question of the sufficiency of the evidence to sustain the finding and judgment is not open for consideration in this Court.

"The finding of the Court was general and was in favor of the defendant. Like a verdict

of a jury it concludes all issues of fact and all mixed questions of fact and law save the questions of law reserved by demurrer, motion, request, or exception. No questions of law were reserved which have not been considered and decided.

"The judgment below must, therefore, be affirmed, and it is so ordered." (Our italics.)

In *Pabst Brewing Company v. E. Clemens Horst Co.*, 264 Fed. 909, at page 911, this Court makes the following statement:

"The principal errors relied upon pertain to the insufficiency of the evidence to support the findings of the District Court. The record fails to show that any request was made by the Pabst Company for findings, and at no time during the trial, or at the close thereof, did counsel for the plaintiff in error ask the District Court to adjudge that the evidence was insufficient to support any finding. The record also fails to show that the Court ruled upon any such points, or that an exception was taken by the plaintiff in error to any ruling upon the omission of the Court to make findings at the request of the plaintiff in error. In *Dangberg Land & Live Stock Co. v. Day*, 247 Fed. 477, 159 C. C. A. 531, where a jury trial was waived and special findings of fact were made in favor of the defendants, and where at the close of the testimony plaintiff in error made no request for a finding in its favor on the issues, and made no motion or request presenting to the Trial Court the question of law whether there was substantial evidence to sustain findings for the defendant, this Court held that the sufficiency of the evidence to support the findings was not open to review in the Court of Appeals."

In *H. F. Dangberg etc. Co. v. Day*, 159 C. C. A., 531, 247 Fed. 477, at page 478, the Court says:

"At the close of the testimony there was no request by the plaintiff in error for a finding in its favor on the issues, and by no motion or request did it present to the Trial Court the question of law whether there was substantial evidence to support the findings, therefore is not open to review in this Court."

In *Societe Nouvelle etc. v. Barnaby*, 158 C. C. A. 294, 246 Fed. 68 and at page 71 this Court states:

"Where the issues of fact are submitted to the Court and the finding is general, nothing is open to the review of the losing party except the rulings of the Court in the progress of the trial, in which is not included the general finding of the Court, nor the conclusion embodied in such general finding. Insurance Co. v. Folsom, 18 Wall 237, 248, 21 L. Ed. 827; Cooper v. Omohundro, 19 Wall 65, 69, 22 L. Ed. 47.

"'Only rulings upon matters of law, when properly presented in a bill of exceptions,' says the Court in *Stanley v. Supervisors of Albany*, 121 U. S. 535, 547, 7 Sup. Ct. 1234, 1238, 30 L. Ed 1000, 'can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment.'

"And it has been expressly held that, where the only matter presented by the bill of exceptions which the Court is asked to review arises upon an exception to the general finding of the Court upon the evidence adduced at the trial, no law is presented which the Court can review.

Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862.

"Such is the interpretation of the statute." (Our italics.)

The only exception in the present case to any ruling upon the sufficiency of the evidence is that found at page 112 of the Transcript to the general finding, and as stated by this Court in the above case, such an exception presents no question for review.

Plaintiff in error in his bill of exceptions tried to avoid the above rule by treating certain statements in the opinion of the Court as special findings of fact, but special findings can only be examined for the purpose of determining whether or not they support the judgment entered, and in any event the opinion of the Trial Court cannot be referred to for the purpose of determining what facts the trial court found when such Court has made a general finding.

In *British Queen Min. Co. v. Baker Silver Min. Co.*, 139 U. S. 199, 35 L. Ed. 147, the Court says:

"The record contains a bill of exceptions, but no exceptions to the rulings of the Court in the progress of the trial of the cause were thereby duly presented, and, although after reciting the evidence, it is therein stated that 'the Court thereafter and during the said term made the following findings of fact and judgment thereon', which is followed by an opinion of the Court assigning reasons for its conclusions, this cannot be treated as a special finding enabling us to determine whether the facts found support the judgment, nor can the general finding be disregarded."

In *Dickenson v. Planters Bank*, 83 U. S. 250, 21 L. Ed. 278, the record was similar to that in the present case and the Court declares:

"It is, however, only when the finding is special that the review of this Court can extend to the determination of the sufficiency of the facts found to support the judgment. Here the record as returned contains what is stated to have been all the evidence in the cause, but the Court has not found what the evidence proves nor any other facts except that stated in the judgment. * * * Some facts, indeed, are stated in the opinion of the Court that seems to have accompanied the judgment, but they are not stated as a special finding. * * * We cannot, therefore, inquire whether the evidence as delivered by the witness was sufficient under the circumstances * * * but though the finding was general, any ruling of the Court in the progress of the trial if excepted to at the time and duly presented by bills of exceptions may be reviewed by us."

The propositions above urged were clearly summarized by Judge Gilbert in the recent case in this Court of *Northern Idaho and Montana Power Co. v. A. L. Jordan Lumber Co.* (C. C. A. 9th Ct.) 262 Fed. 765 at page 766 in the following words:

"On the trial no exceptions were taken to any ruling of the Court, and no request was made for special findings, or for a finding in favor of the defendant in the action. *The plaintiff in error refers to the opinion of the Court below as containing special findings of fact, but the opinion cannot be resorted to for that purpose. Dickinson v. Planters Bank*, 16 Wall 257, 21 L. Ed. 278;

British Queen Min. Co. v. Baker Silver Min. Co., 139 U. S. 222, 11 Sup. Ct. 523, 35 L. Ed. 147; *Saltonstall v. Birtwell*, 150 U. S. 417, 14 Sup. Ct. 169, 37 L. Ed. 1128; *York v. Washburn*, 129 Fed. 564, 64 C. C. A. 132; *Hayden v. Ogden Savings Bank*, 138 Fed. 91, 85 C. C. A. 558; *United States v. Sioux City Stock Yards Co.*, 167 Fed. 127, 92 C. C. A. 518; *Gibson v. Luther*, 196 Fed. 203, 116 C. C. A. 35.

"In the absence of a special finding, the judgment must be affirmed, unless the complaint fails to state a cause of action, or the bill of exceptions presents some erroneous ruling of the Court in the progress of the trial. *Norris v. Jackson*, 9 Wall 125, 19 L. Ed. 608. *There being in the present case no ruling of the trial court, and no special finding of fact, but only a general finding, the latter must be accepted as conclusive, and this Court can go no further than to affirm the judgment. Lehnem v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; *Dunsmuir v. Scott*, 217 Fed. 200, 133 C. C. A. 194; *Pennsylvania Casualty Co. v. Whiteway*, 210 Fed. 782, 127 C. C. A. 332." (Our italics.)

UNDER THE ABOVE AUTHORITIES THE FOLLOWING WELL-ESTABLISHED PRINCIPLES CONTROL THE SCOPE OF THE REVIEW BY THIS COURT IN THE CASE AT BAR:

1. There can be no reversal for errors of the Trial Court on questions of fact or of mixed law and fact.

2. This Court cannot review the evidence and determine whether or not it is sufficient to show gross negligence or that plaintiff in error would have sold his stock and received the price stated in

the telegram therefor, if such telegram had been delivered promptly, or whether or not he suffered actual damage because there was no motion or request for a judgment or for a declaration of law, which would be equivalent to a motion for a peremptory instruction in a case tried before a jury.

3. The exception to the general finding in favor of your petitioner presents no question to this Court for review.

4. This Court is not at liberty to treat the statements in the Trial Court's opinion as special findings of fact, and in the absence of special findings it is not open to this Court to reverse the Trial Court on the ground that the facts assumed to have been found by such Court do not support the judgment.

5. This Court having reversed the judgment not for any errors of law occurring at the trial, and duly excepted to, but having reversed it upon the ground that the evidence was insufficient to support the general finding, or, in other words, for errors in fact, a rehearing should be granted and the judgment affirmed.

Several other questions are raised by the petition for rehearing which we will discuss briefly. The first relates to the bill of exceptions. Upon motion in the Trial Court a portion of the bill of exceptions was stricken out and the balance retained. Plaintiff in error excepted to the action in striking out a

portion of the bill and assigned error thereon, and on this point this Court decided against him. Your petitioner, however, not having sued out a writ of error from the decision below did not attack the action of the Trial Court in this regard, but filed a motion in this Court to strike out the entire bill of exceptions upon the ground that it was not seasonably settled and allowed. In its opinion this Court refers solely to the action of the Trial Court in declining to settle the balance of the bill of exceptions and apparently overlooked the motion filed in this Court. It also appears from the opinion herein that this Court assumed that the time for presenting such bill of exceptions for settlement had been regularly extended to July 8th, 1920, and this being within the term at which the judgment was entered, it was held to be sufficient. The facts, however, are otherwise. The judgment was entered and notice thereof served upon May 8th, 1920. The time for presenting a bill of exceptions expired under Rule 76 of the Trial Court, set out in the bill of exceptions, May 18th, 1920, but plaintiff in error had under the rules until June 7th, 1920, to file a petition for new trial. Such a petition was filed upon June 5th, 1920, and upon June 17th, 1920, *thirty days after the time for presenting a bill of exceptions had expired under the rule*, counsel for plaintiff in error asked for and obtained from the Court an order extending the time for presenting a bill of exceptions. Upon these facts we submit that this Court should have sustained our

motion to strike the entire bill of exceptions, and as there would, in that event, be no ruling before the Court presented for review, as required by the statutes, the judgment should be affirmed.

This question was discussed at length at pages 22 to 38, inclusive, of our printed Brief, and we think the authorities there cited fully sustain our contention. Thus in the case of *Oxford and Coast Line R. R. Co. v. Union Bank*, 82 C. C. A. 609 (4th Circuit), 153 Fed. 723, the Court makes the following statement:

“However, in the district in which this case was tried there is a rule of Court which only allows twenty days in which to prepare and file a bill of exceptions. Notwithstanding this rule, the Court had the power to extend the time in which to prepare and file a bill of exceptions, *provided it did so within twenty days, but, once the Court permitted the twenty days to expire, then it no longer had the power to extend the time, and the case would stand just as though the term had expired.*” (Our italics.)

In the case of *Russo-Chinese Bank v. National Bank*, 109 C. C. A. 398, 187 Fed. 80, the order extending the time recited that it was for good cause shown, and in other cases the filing of a motion or petition for new trial before the expiration of the time has been held to justify an extension. In the case at bar the motion for new trial was filed long after the time had expired, and it could not operate to revive the Court’s jurisdiction over the bill of exceptions. Other cases in this connection are:

Philadelphia etc. Co., 218 U. S. 255, 54 L.
Ed. 1031;
Dalton v. Hazelet, 105 C. C. A. 99, 182 Fed.
561.

In the former case the Supreme Court of the United States held that where the time had expired before the extension all the proceedings were *coram non judice* and void. In the latter case this Court said at page 568:

"When the order was made the time for filing exceptions had long since expired and the Court had no authority to extend the time."

WHEREFORE, your petitioner respectfully requests that a rehearing may be granted in this case.

Respectfully submitted.

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Attorneys for Petitioner.

FRANCIS R. STARK, of New York,
Of Counsel.

We hereby certify that the foregoing petition for rehearing is not filed for delay and in our opinion is well founded in point of law.

BEVERLY L. HODGHEAD,
RICHARDS & HAGA,
Attorneys for Petitioner.

No. 3543

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. A. CZIZEK,

Plaintiff in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY
(a corporation),

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

on Motion to Amend Judgment.

BEVERLY L. HODGHEAD,

RICHARDS & HAGA,

Attorneys for Defendant in Error.

FRANCIS R. STARK,

New York,

Of Counsel.

FILED

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BRIEF OF DEFENDANT IN ERROR

on Motion to Amend Judgment.

The effect of all the cases cited in the Brief of Plaintiff in Error on the motion to amend the judgment is that where the cause is tried by the court upon an *agreed statement* of facts or where the court has made *special findings* of fact, this court may direct the entry of such judgment as under the law should have been entered thereon. This rule, however, does not apply where, as in this case, there was no special finding or agreed statement. See *Lehmen v. Dickson*, 148 U. S. 71, hereafter referred to. Here there was a general finding in favor of the defendant (Tr. p. 112). This is

the equivalent of a finding of fact against the plaintiff and in favor of the defendant upon all the issues made by the pleadings. One of these issues involved the question whether the plaintiff, had he been minded to accept the offer, could have delivered the stock at Boise while the alleged purchaser was able to buy. The court said in its opinion (Tr. p. 41):

“It involves the question whether he would or would not have embraced the opportunity of which the telegram was intended to advise him, and, if so, whether he *could* and would have delivered the stock, which was then held in a San Francisco bank, as collateral, while Miller was willing and able to keep his offer good.”

Plaintiff alleged in his complaint that Miller was ready and willing to buy the stock, and plaintiff was ready and willing to sell the same, and that if the telegram had been delivered he would have sold the stock (Par. VIII of Complaint, Tr. p. 10). In paragraph VIII of the answer (Tr. pp. 17 and 18), these allegations are denied.

The evidence is that the stock was held by a bank in Oakland, California, as collateral for a debt due from the plaintiff. The message in suit, being a night letter, was filed at Boise, Idaho, Friday, November 30th. It should have been delivered Saturday morning, Dec. 1st. It was problematical whether plaintiff could have secured the release of the stock before the closing of the bank at noon of Saturday, and there was no evidence that he

could have done so. If the stock had not been mailed to Boise before Monday, December 3d, it would not have reached Boise until after Miller's account there was overdrawn (see Tr. p. 94). The cashier testified "At the close of business on the 5th of December Mr. Miller's account shows an overdraft of \$20,978.76".

The general finding for the defendant is tantamount to a finding that plaintiff could not have delivered the stock at Boise in time to have effected the sale. The court was of the opinion "that the evidence is insufficient to support a finding * * * that he (plaintiff) could have or would have delivered the stock, which was held in a San Francisco bank as collateral while Miller was willing and able to keep his offer good" (Tr. p. 111).

Counsel for plaintiff in error contend that this was clearly a matter of law, but we urge that the question whether, under the evidence, the plaintiff could have delivered the stock while Miller was ready and able to buy is a question of *fact* which this court will not assume to determine. While there may be no conflict in the testimony upon this point, the credibility of the witnesses is addressed to the trial court.

If the court below had made a special finding in favor of the defendant upon the above issue as to the plaintiff's ability to deliver the stock and Miller's ability to buy, this court would not direct the entry of judgment for the plaintiff. The gen-

eral finding, however, which the court did make has the same effect, and therefore this court is without power to grant the motion here made.

The counsel for plaintiff in error seem to treat the opinion of the court as a special finding, which we have shown in our petition for rehearing cannot be so construed. Upon this point and upon the further question of the distinction between the power of the Court of Appeal in cases where there is a *general finding*, and those where there is an agreed statement or special finding of fact, we respectfully ask the court to review the case of

Lehmen v. Dickson, 148 U. S. 71; 37 L. ed.

373.

The court says:

“There is no special findings of facts and no agreed statement of facts. Obviously, therefore, inquiry in this court must be limited to the sufficiency of the complaint and rulings, if any be preserved on questions of law arising during the trial.”

Also, see page 77:

“To obviate the objection that there is no finding of facts, or agreed statement thereof, counsel for plaintiff in error insists that there is really no dispute as to the facts, no conflict in the testimony as to any substantial question, the only difference being as to a subordinate and unimportant matter, and that, therefore, it is the same as though the facts had been agreed upon or found. Further, they suggest that in the opinion delivered by the trial judge there is a narration of the facts

we have heretofore recited, together with others, and then this statement preliminary to the discussion of the legal questions: 'Thayer, *District Judge*, after stating the facts as above', and claim that such statement is equivalent to a finding of the facts as previously recited.

But the burden of the statute is not thrown off simply because the witnesses do not contradict each other, and there is no conflict in the testimony. It may be an easy thing in one case for this court, when the testimony consists simply of deeds, mortgages, or other written instruments, to make a satisfactory finding of the facts, and in another it may be difficult, when the testimony is largely in parol, and the witnesses directly contradict each other. But the rule of the statute is of universal application. It is not relaxed in one case because of the ease in determining the facts, or rigorously enforced in another, because of the difficulty in such determination. The duty of finding the facts is placed upon the trial court. We have no authority to examine the testimony in any case, and from it make a finding of the ultimate facts."

See, also,

Wilson v. Merchants Loan & Trust Co., 183
U. S. 123,

and

Packer v. Whittier, 91 Fed. 511.

We rest our opposition to this motion on the point that where there is no agreed statement or special findings, as in the cases cited by the plaintiff in error, but only a general finding in favor of the defendant on issues of fact, made by the plead-

ings, the Court of Appeal will not make new findings of fact or direct the entry of judgment for the plaintiff.

Dated, San Francisco,
May 12, 1921.

Respectfully submitted,

BEVERLY L. HODGHEAD,

RICHARDS & HAGA,

Attorneys for Defendant in Error.

FRANCIS R. STARK,

New York,

Of Counsel.

United States
Circuit Court of Appeals
For the Ninth Circuit.

AL WEATHERS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Alaska, Division No. 1.

FILED
OCT 20 1920
F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals
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Attorneys for Plaintiff in Error.

Hon. JAMES A. SMISER, United States Attorney,
Juneau, Alaska,
For Defendant in Error.

District Court for the District of Alaska, Division
No. One.

1346-B.

Sections 1897 and 1898, C. L. A.

THE UNITED STATES OF AMERICA

vs.

AL WEATHERS, IKE WEATHERS and ER-
NEST STAGE.

Indictment.

At the regular September term of the District Court of the United States of America, within and for the District of Alaska, in the year of our Lord one thousand nine hundred and nineteen, begun and held at Juneau, in said District, beginning September 2d, 1919.

COUNT ONE.

The Grand Jurors of the United States of America, selected, empaneled, sworn, and charged within

and for the District of Alaska, accuse Al Weathers, Ike Weathers and Ernest Stage by this indictment of the crime of maliciously shooting at another person with the intent to kill, wound and maim such person, committed as follows:

The said Al Weathers, Ike Weathers and Ernest Stage, at or near Admiralty Cove, within the said District of Alaska, and within the jurisdiction of this court, on the 8th day of July, in the year of our Lord one thousand nine hundred and nineteen, did then and there unlawfully, wilfully, maliciously and feloniously shoot at another person, to wit, Alfred Knutson, with intent to kill, wound and maim him the said Knutson by then and there maliciously shooting and firing at him, the said Knutson with rifles then and there loaded with powder and leaden balls, a further description of said rifles being to the Grand Jury unknown is therefore not stated.

And so to the Grand Jurors duly selected, empaneled, sworn and charged as aforesaid, upon their oaths do say: That Al Weathers, Ike Weathers and Ernest Stage did then and there commit the crime of maliciously shooting at another person with the intent to kill, wound and maim such person, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America. [1*]

COUNT TWO.

The Grand Jurors of the United States of Amer-

*Page-number appearing at foot of page of original certified Transcript of Record.

ica, selected, empaneled, sworn and charged within and for the District of Alaska, further accuse AL WEATHERS, IKE WEATHERS and ERNEST STAGE by this indictment of the crime of ASSAULT WITH INTENT TO COMMIT ROBBERY, committed as follows:

The said Al Weathers, Ike Weathers and Ernest Stage, at or near ADMIRALTY COVE, within the said District of Alaska, and within the jurisdiction of this Court, on the 8th day of JULY, in the year of our Lord one thousand nine hundred and nineteen, did then and there wilfully, unlawfully and feloniously, with the intent then and there to commit the crime of robbery on the person of one Alfred Knutson, assault him the said Knutson by then and there shooting at him with rifles loaded with powder and leaden balls, a further description of said rifles is unknown to the Grand Jury and therefore not stated; they the said Al Weathers, Ike Weathers and Ernest Stage then and there committed said assault as aforesaid intending thereby to put him the said Alfred Knutson in fear and thereby and by such force and violence intending to take, steal and carry away certain fish then and there in the joint possession and control of him the said Knutson and others, they the said Knutson and others being then and there servants, agents and employees of the HOONAH PACKING COMPANY, a corporation then and there duly organized and existing as such, said fish then and there being the personal property of said company and having

theretofore been caught and then and there being held in a trap belonging to said company and situated at or near ADMIRALTY COVE aforesaid.

And so the Grand Jury duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say: That AL WEATHERS, IKE WEATHERS and ERNEST STAGE did then and there commit the crime of assault with intent to commit robbery, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America. [2]

COUNT THREE.

The Grand Jurors of the United States of America, selected, empaneled, sworn, and charged within and for the District of Alaska, further accuse AL WEATHERS, IKE WEATHERS and ERNEST STAGE by this indictment of the crime of ASSAULT WITH INTENT TO COMMIT ROBBERY, committed as follows:

The said Al Weathers, Ike Weathers and Ernest Stage, at or near ADMIRALTY COVE, within the said District of Alaska, and within the jurisdiction of this Court, on the 8th day of July, in the year of our Lord one thousand nine hundred and nineteen, did then and there wilfully, unlawfully and feloniously, with the intent then and there to commit the crime of robbery on the person of one ALFRED KNUTSON, assault him the said Knutson by then and there shooting at him with rifles loaded with powder and leaden balls, a further de-

scription of said rifles is unknown to the Grand Jury and therefore not stated; they the said Al Weathers, Ike Weathers and Ernest Stage then and there committed said assault as aforesaid intending thereby to put him the said ALFRED KNUTSON in fear and thereby and by such force and violence intending to take, steal and carry away certain fish from a scow then and there in the joint possession and control of him the said Knutson and others, as servants, agents and employees of the HOONAH PACKING COMPANY, a corporation then and there duly organized and existing as such, said fish then and there being the personal property of said company and being contained in said scow then and there situated at or near ADMIRALTY COVE aforesaid.

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say: That AL WEATHERS, IKE WEATHERS and ERNEST STAGE did then and there commit the crime of assault with intent to commit robbery, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

JAMES A. SMISER,
United States Attorney. [3]

WITNESSES:

Alfred Knutson.	Andy Abrahamson.
Sofus Ellerson.	M. S. Whittier.
Henry J. Alexander.	Herman Mitts.
Swan Swanson.	Dr. W. A. Borland.
Iver Stenso.	Geo. L. Johnson.

Presented by W. L. Martin, Foreman of the Grand Jury, in the presence of the Grand Jury, in open court and filed in open court with the clerk of the District Court, all on this 9th day of September, 1919.

J. W. BELL,
Clerk of the District Court, Dist. of Alaska, Division No. 1.

By John T. Reed,
Deputy.

[Endorsed]: No. 1346-B. United States District Court, District of Alaska, First Division. The United States of America vs. Al Weathers, Ike Weathers and Ernest Stage. Indictment. Violation of Sections 1897 and 1898, C. L. A. A true bill. W. L. Martin, Foreman. Filed this 9th day of September, A. D. 1919. J. W. Bell, Clerk. By John T. Reed, Deputy. James A. Smiser, United States Attorney. [4]

[Caption and Title.]

Bill of Exceptions.

Be it remembered that the above-entitled cause came on regularly for trial in the above-entitled court on the — day of —, 1920, before the Hon. Robert W. Jennings, Judge of said court, pre-

siding, when the defendant and his attorneys, O. P. Hubbard and Henry Roden, and the United States Attorney, James A. Smiser, were in court.

Whereupon the following proceedings were had: A jury was duly and regularly impaneled to try this cause, and thereafter *and* the following testimony was taken and proceedings had:

Filed in the District Court, District of Alaska, First Division. April 15, 1920. J. W. Bell, Clerk.
By ———, Deputy. [5]

**Testimony of Captain Alfred Knutson, for the
Government.**

Captain ALFRED KNUTSON, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. SMISER.)

Q. Will you please state your name to the jury?

A. Alfred Knutson is my name.

Q. Where were you and how were you employed during May, June and July of the year 1919?

A. I was employed for the Hoonah Packing Company.

Q. What was your business?

A. I was running one of their cannery tenders.

Q. What was the name of the boat?

A. "Forrester."

Q. What position on that boat did you hold?

A. I was master of the boat.

Q. Where were you on the morning of July 8, 1919?

(Testimony of Captain Alfred Knutson.)

A. I was laying at Admiralty Cove, Admiralty Island.

Q. Where was the boat?

A. The boat was there tied up to a dolphin.

Q. Were you on the boat at that time?

A. Yes, sir.

Q. Were there any other people on the boat at that time?

A. There was twelve besides me.

Q. Where were they at that time?

A. They were all on board.

Q. On board. When did you come into Admiralty Cove last? A. When I came in?

Q. Yes, when did you come in there?

A. I came in there the night before—that would be the 7th.

Q. The 7th, and where did you tie up?

A. I tied up to this dolphin. [8]

Q. Now, were you awakened the next morning at any time?

A. Yes, I woke up around five o'clock.

Q. What was it, if anything, that woke you up?

A. Well, I woke up by—I could hear shots fired.

Q. Where were you sleeping on the boat?

A. I was sleeping in a little cabin right back of the pilot-house, in a room there.

Q. What did you do upon hearing the shots?

A. Well, I got up.

Q. Did you look out?

A. I looked out through the pilot-house window.

Q. What did you see, if anything?

(Testimony of Captain Alfred Knutson.)

A. I seen a boat laying out on the water.

Q. Was it moving?

A. Yes, it was going slowly ahead.

Q. Was it approaching or going away from you?

A. Well, it was kind of coming towards us, like, not exactly head on.

Q. Coming towards you?

A. That way—it wasn't exactly head on, though, but it was coming towards us, like.

Q. Could you observe where the shots were coming from that you were hearing?

A. Yes, sir; those shots were coming from that boat.

Q. What did you do upon seeing that?

A. Why, I went forward where the crew slept, down in the forecandle.

Q. Now, in going from the point you were to the forecandle did you go through any room on the boat?

A. No, I went out from the pilot-house—I went right forward.

Q. You went straight forward? A. Forward.

Q. After you got out of the pilot-house were you under cover—was there anything over you? [9]

A. No, I was out in the open then.

Q. If this table represents the deck of the boat, about where was the pilot-house situated—tell me where to place this paper here to indicate it.

A. What does the paper indicate, now—the pilot-house?

Q. Yes.

A. The other end, then—the fore part of the boat.

(Testimony of Captain Alfred Knutson.)

Q. Where was the pilot-house with reference to that?

A. This is the fore part of the boat, and the pilot-house was placed back about,—I don't know how many feet back on the boat it is, but it is a little better than amidships—it is a little forward of amidships, and of course when I went out I went forward.

Q. Where is the forecastle?

A. Located right in the front of the boat.

Q. How far is it from the outside edge of the pilot-house over to the forecastle?

A. I don't know exactly—I never measured it, but I should judge it was around 10 or 12 feet.

Q. Now, which door of the pilot-house did you go out,—is there a door on each side?

A. There is a door on each side.

Q. Now, if the boat was laying out in this direction from you, did you get out on this side next to the boat or on the side opposite from the boat?

A. I was twice out of that pilot-house, and I don't remember which side I did go out on the last time, but I remember I went out once on this side—that is, the starboard side.

Q. But you don't remember which time that was?

A. I don't remember plainly—that is six or seven months ago.

Q. You say you came out of this pilot-house and went down to the forecastle,—for what purpose did you go down there, Captain?

A. I went down to notify the crew that was sleep-

(Testimony of Captain Alfred Knutson.)

ing there that there was a boat shooting—firing on us. [10]

Q. Where was the crew down there in the boat sleeping?

A. Well, part of the crew slept in the fore-castle, and the other part slept down in a stateroom right below the deck; about amidships is another living quarter.

Q. Was there anyone sleeping up in the part of the boat where you were before you went down there?

A. Yes, Ellison; he slept in the same room I was sleeping, and the cook, he had a room for himself.

Q. On the upper part of the boat?

A. On the upper part of the boat.

Q. After you went down into the bow of the boat, went down in the hold, and warned the men that the boat was being shot at, what did you do next?

A. Well, I came back to the pilot-house again.

Q. How did you come,—the same route,—did you take the same route—the same way?

A. I had to come out the same route—come out at the fore-castle and walk the deck back.

Q. And you came back. Where did you go then?

A. I went into the pilot-house.

Q. Do you remember which side of the pilot-house you went in? A. I don't remember now.

Q. I will ask you if any shooting was going on at that time? A. Oh, yes.

Q. I will ask you if you heard any bullets at that time?

(Testimony of Captain Alfred Knutson.)

A. Yes, I heard bullets across the boat, and you could see them splash in the water across the boat.

Q. You could hear them and see them splash in the water across the boat,—could you tell where the bullets were coming from,—the direction, I mean?

A. Those bullets came right from that boat.

Q. After you went in the pilot-house what did you do?

A. I had the engine started—I called the engineer, and he started the engine. [11]

Q. How long did you run the engine?

A. I don't remember exactly—probably three or four minutes, something like that.

Q. What was your object in starting the engine at that time?

A. Object was, I didn't know whether the boat was coming right in there on me or not, because I figured if it was I would try to get out.

Q. You were figuring if the boat was coming on to you you wanted to have your boat in motion?

A. I noticed the boat kind of guided farther out then so I stopped the engine at that time.

Q. What did you do after you noticed the boat turn out, in regard to your engine?

A. After I stopped the engine?

Q. Yes.

A. Well, I went back to the forecastle again.

Q. When you left the pilot-house the last time, or this second time, where did you go?

A. Back in the forecastle.

(Testimony of Captain Alfred Knutson.)

Q. What, if anything, happened when you were going there?

A. Well, just as I stepped out of the pilot-house there was a bullet passed me very close.

Q. How close would you say?

A. I am sure it didn't pass me over four inches.

Q. What part of your body?

A. Right—in front of my eyes.

Q. What effect, if any, did that have on you?

A. It jarred me, and throwed my head back like that, you know, and I fell right down.

Q. You fell on the deck of the boat?

A. Yes.

Q. After you fell there what did you do?

A. I got up and went down the forecastle as fast as I could. [12]

Q. You say you felt that bullet,—I mean you felt the effect of it?

A. No, but it z-z-z when it went past through the air.

Q. How about the wind,—what effect did it have on the wind—did you feel the wind?

A. That I don't remember—it was such quick action, you know, you haven't got time to—

Q. You say it passed within about four inches of your forehead?

A. Yes; I am sure it wasn't more than four, anyway.

Q. Was the shooting still going on?

A. Yes, the shooting was still going on.

Q. Could you tell from where those shots were

(Testimony of Captain Alfred Knutson.)

coming? A. It was coming from that boat.

Q. Had that boat then turned out to sea?

A. He had kind of steered out then.

Q. What is that? A. Ask the question again.

Q. Had it passed out at the time?

A. I don't know what you mean by passing out. It kind of changed its course—had steered out.

Q. Steered out to sea from the shore, is that what you mean? A. From the shore, yes.

Q. Then you went down in the bow of the boat immediately after the scrambling in this place?

A. Yes.

Q. How long did the firing continue after that?

A. I don't remember how long; it continued a few minutes—I couldn't exactly say how long—I never watched the time close.

Q. Where did this boat go then—which way did it take its course? A. After the shooting?

Q. Yes.

A. Well, she headed on about for Point Augustus—White Stone Harbor—out that direction.
[13]

Q. Was that on the opposite side of the bay from where you were—the other side of the water—the other shore line?

A. It was on the other shore line, yes, sir.

Q. Now, Captain, there is a little drawing on the board—go over there and take that pointer,—I will ask you whether that little diagram fairly represents an outline of the shore line and the position of the fish-traps as they existed on July 8, 1919?

(Testimony of Captain Alfred Knutson.)

A. Well, the traps—

Q. I say, does it fairly represent the shores?

A. Yes, it does, pretty fair.

Q. Now, beginning at the right-hand corner of that drawing I see something marked there—what is that?

A. This here is what you mean? (Indicating.)

Q. Yes. A. That represents that trap.

Q. What trap is that?

A. That is fish-trap No. 1.

Q. What is the name of it?

A. Admiralty trap No. 1.

Q. What is the little drawing over to the right of that? A. That represents a rock.

Q. Which way is Funter Bay from that point, in a general direction?

A. Funter Bay is further over this way.

Q. Is that farther to the right?

A. To the right, yes.

Q. Now, I notice two cross-marks there near that lead of the trap—what do those cross-marks represent?

A. Those represent the two dolphins that are there to tie up the boat and the scow, and we were tied to this dolphin here.

Q. Your boat was tied to the second one from the lead? A. From the lead; yes, sir.

Q. What does that oblong circle represent? [14]

A. Represents the boat, because she was laying right here.

Q. Was the boat lying in the position that oblong

(Testimony of Captain Alfred Knutson.)

circle occupies or was it in some other position?

A. Not exactly—her stern was swung more into the beach like.

Q. And her bow would be in what direction then?

A. Her bow would be, of course, tied up to the dolphin, but the stern would be swung in a little.

Q. I notice a square drawing along the side of that representation of the boat—what is that?

A. That is a representation of the scow,—we had a scow alongside of the boat at that time.

Q. On which side of the boat was that scow lying?

A. On the port side.

Q. Would that be out toward the water?

A. That would be facing out toward the water.

Q. Was it close up to the boat,—was it alongside?

A. The scow,—oh, yes, she was laying right alongside.

Q. Then the end of that scow would be more toward the shore than is drawn on that little diagram, would it,—the hind end of the boat, that is to say?

A. The stern of the boat and the stern of the scow which was tied right alongside was drawn in toward the shore.

Q. I notice another point—what is the next point represented there?

A. That represents also a fish-trap that is located there—they call it the Bay trap,—she is a pile-trap.

Q. Going down the shore line is there another trap there?

A. This mark here represents that floating-trap.

Q. Floating-trap number what?

(Testimony of Captain Alfred Knutson.)

A. No. 4, I think it is, belonging to the Hoonah Packing Company.

Q. To whom do these three traps belong, or did they belong at that time?

A. That is the Hoonah Packing Company's traps.

Q. Now, go down the shore line farther to the left,—I see [15] another mark in there,—what does that indicate?

A. That indicates also a fish-trap.

Q. What fish-trap is that?

A. I think it belongs to Hawk Inlet.

Q. That did not belong to the Hoonah Packing Company?

A. No, it did not belong to the Hoonah Company.

Q. Now, following the shore line along to what appears to be a point farther out—what point is that?

A. I don't know the exact name of that point,—I don't think you can find it on the chart.

Q. Do you know whether any company had some traps around the point?

A. I think there was a trap here at this point here.

Q. Belonging to what company?

A. I am not sure—I think it was the Hawk Inlet, as far as I know—I am not positive.

Q. Now, I notice a little square drawing on the land side of this map, up toward the right, a little square there,—what does that indicate?

A. That is the camp where the watchman stayed.

Q. Is it a cabin? A. A cabin; yes.

Q. I notice a drawing right in front of it—a straight line—what does that indicate?

(Testimony of Captain Alfred Knutson.)

A. Well, they had built up some kind of a fortification up there.

Q. A fortification was built up?

A. It was built of logs.

Q. When you first woke up and looked out in the direction of the boat that was doing the firing, indicate on the map about where you saw it, as near as you can.

A. The distance I couldn't tell exactly.

Q. I know, but indicate it on the map there,—when you first saw it, now, not when you last saw it.

A. Just about abreast of this bay trap—outside of the bay trap, when I first saw them. [16]

Q. When you last saw it where was it?

A. They were heading along out this way somewhere—I don't remember plainly, but she was going along this direction—I could not say exactly how close in she was, or how far out.

Q. You couldn't say how near to trap No. 1?

A. I couldn't say.

Q. But it was in that general direction?

A. She was going out in that direction.

Q. Is that out towards the water?

A. It is towards the water; yes.

Q. About how far would you estimate that the boat was from the "Forrester," or where the "Forrester" was lying when you first saw it during this firing?

A. Well, that is hard for me to judge exactly how close.

Q. Well, just give your best estimate.

A. I would say 2,000 feet—I don't know how close,

(Testimony of Captain Alfred Knutson.)

—that would come up about here.

Q. That is about as near an estimate as you feel you could make? A. Yes.

Q. How close was it at the nearest point you saw it to your boat?

Judge HUBBARD.—If the Court please, the witness has just answered the question.

Mr. SMISER.—No, I asked him where it was when he first saw it,—did you understand it that way?

The WITNESS.—Ask me that question again.

Q. When you first saw the boat how far was it from the “Forrester”?

A. I just said it was, as near as I can remember, just out of the Bay trap here.

Q. Did it approach nearer the “Forrester” from the time you first saw it?

A. It naturally would if you hit this way.

Q. And when you saw it last how far was it, do you know?

A. Well, that distance is pretty hard for me to say.

Q. It is pretty hard for you to estimate that. All right. I [17] will ask you if you took note of that boat during the time you were looking at it there while the shooting was going on? A. Yes, I did.

Q. Do you know what boat that was?

A. I recognized it to be the “Diana.”

Q. Now, when was the next time that you saw that boat, if ever? A. Two days after.

Q. Where did you see it?

A. I saw her down by the Sisters—Sisters Island.

Q. Were you on your boat at that time?

(Testimony of Captain Alfred Knutson.)

A. I was on the "Forrester," yes, sir.

Q. Did you have the scow with you? A. In tow.

Q. Before I leave this point I want to ask you if there was any ammunition and arms on the "Forrester" the morning that this occurred?

Mr. HUBBARD.—I think we will object to that as immaterial.

The COURT.—Yes, I do not think that is pertinent at this time—it might be in rebuttal.

Mr. SMISER.—Yes, it really would be—I will withdraw the question.

Q. I will ask you if you know whether there was anything on the scow at the time this shooting was going on? A. Yes, we had fish on her.

Q. About how many fish?

A. About two or three thousand fish, or four—I couldn't say about that.

Q. Now, while the shooting was going on, you say that you heard bullets and saw bullets splashing in the water just over the bow of the boat—just across?

A. They come just across the boat—just about between the mast and the pilot-house.

Q. Did any of the bullets strike the boat?

A. I didn't see any bullets strike the boat, but there was one that struck in the bow of the boat. [18]

Q. Where was that,—how do you know that?

A. Well, there is a plate there set on the boat to protect the wood when you are heaving the anchor.

Q. What is the plate made of? A. Sheet iron.

Q. A sheet iron plate to protect the boat from the anchor? A. Yes, sir.

(Testimony of Captain Alfred Knutson.)

Q. What did you see on that?

A. Well, there has been a bullet strike there, I see, and glanced right on on that plate.

Q. What was it that struck there?

A. There has been a bullet struck on that plate.

Q. Did you see the mark of it?

A. Why, yes, sir.

Q. Did you examine the scow?

A. Yes, I examined the scow afterwards.

Q. What did you find there, if anything?

A. I found a bullet hole in her.

Q. How many bullet holes did you find in the scow?

A. Well, there was three or four of them.

Q. Now, how about the height of the scow compared with the height of the boat, above the water line?

A. Well, now, I suppose you all have seen a fish scow?

Q. Yes.

A. You know there is a box made on the top of the deck of a fish scow,—now, if you mean from the water edge up to the top of that box?

Q. Yes. A. Or do you mean just the scow?

Q. No, I mean the top of the box.

A. I never measured it exactly, but I should judge there is 6 or 7 feet from the water line to the top of the box.

Q. How far was it from the deck of the boat to the water line? [19]

A. Well, that depends on the main deck, it is built up amidships there; it is what you call a pump-deck—

(Testimony of Captain Alfred Knutson.)

it is built up there and from the water line up to that pump-deck is about, I would say, five feet.

Q. Five feet?

A. I should judge—I never measured it, however, but three, four or five feet.

Q. Then the top of this planking that is on the scow made it a little higher than the general top of the boat, did it? A. Yes, a little higher.

Q. Was it as high as the top of the cabin?

A. Oh, no, no.

Q. So that the scow, if this table represents the boat, and the scow was situated here where I am sitting, up against it, these boards on the scow would come a little higher than the top of the boat, in a general way? A. The top of the deck, you mean?

Q. The top of the deck. A. Yes, sir.

Q. Now, you say that you saw this boat again on the 10th near the Sisters at the time that you were on your boat,—where did you see it in reference to your boat—how far away?

A. I see her going down towards Pleasant Island, down towards Icy Straits—I couldn't say how far away she was—two or three miles—two miles, or so.

Q. What did you do, if anything, when you saw that boat?

A. I changed my course—I wanted to hail her.

Q. Changed your course and went to hail that boat?

A. I wanted to hail it; yes.

Q. What was your purpose in wanting to hail it?

A. I recognized that was the same boys that was shooting at us before.

(Testimony of Captain Alfred Knutson.)

Mr. HUBBARD.—I don't believe that testimony is admissible. He is asking what his purpose was in hailing the boat on the 10th, [20] and it is incompetent and irrelevant so far as the issues in this indictment are concerned.

Mr. SMISER.—No, it is not, in my judgment.

Mr. HUBBARD.—It might come in later on in rebuttal, but at this time it is not admissible.

The COURT.—I do not see how it can possibly injure anybody—it is only an explanation of what he was doing himself, and it does not connect the defendant in any way as yet. I think he may testify what his purpose was, and if the defendant is not connected with it in any way it will be stricken.

Q. What was your purpose in hailing her, Captain?

A. The purpose was, I recognized her to be the same boat.

Mr. HUBBARD.—I thought the Court ruled that he could not answer the question as to this purpose.

The COURT.—The objection is overruled—he may testify what his purpose was.

Mr. HUBBARD.—Exception.

Q. Did you know what the name of the boat was at that time?

A. I didn't see the name on her; no.

Q. You didn't know at that time and you wanted to find out what the name of it was,—was that it?

A. Yes, I wanted to see the name of it.

Q. You wanted to see the name of it and that is the reason you hailed it, as you recognized it as the

(Testimony of Captain Alfred Knutson.)

boat that did the shooting and you wanted to see the name of the boat, is that it?

Mr. HUBBARD.—I object to that—the witness has not stated that.

The COURT.—No, he did not say that—do not lead the witness.

Mr. HUBBARD.—In connection with these objections, I would like to ask him how far that boat was away when he says he recognized it.

The COURT.—You will have an opportunity to cross-examine him.

Mr. HUBBARD.—Yes, but I want to put in an objection if the boat was the distance I understand it to be. [21]

Mr. SMISER.—That is a matter of cross-examination.

Mr. HUBBARD.—It might save time in the matter of objections,

The COURT.—You can cross-examine him fully when the time comes.

Mr. HUBBARD.—Then I will put in the objection when he answers it.

The COURT.—Answer the question.

The WITNESS.—What was the question?

Q. (By Mr. SMISER.) The question was, what was your purpose in hailing the boat and going up close to it,—what did you do that for?

A. I wanted to get up close and see the name of it.

Q. Why did you want to see the name of that boat?

A. I recognized it to be the same boat that was up there the 8th.

(Testimony of Captain Alfred Knutson.)

Q. That shot at you? A. The 8th.

Q. Now, what did you do in order to hail it?

A. I changed my course.

Q. Well, what did you do with your scow?

A. I dropped the scow—left the scow—dropped the scow.

Q. Then what did you do—did you come close to it?

A. Yes, changed my course to hail her.

Q. Then you approached it? A. Exactly.

Q. Now, when you approached the boat what did it do?

A. Well, after they run a little while they turned right around.

Mr. HUBBARD.—If the Court please, I think he has now stated what his purpose was, and what he accomplished. Now he is testifying what the boat did.

The COURT.—That is the very object of the testimony, to find out what the boat did—not what he did. The very object of this testimony is to show what the boat that he recognized as being the boat that fired the shots did.

Mr. HUBBARD.—We wish to object to any testimony as to what it did as being incompetent, irrelevant and immaterial in this case [22] at this time, what the boat did. The purpose, we understood, was that he wanted to identify the boat.

The COURT.—The objection is overruled.

Mr. HUBBARD.—The defendant saves an exception to the ruling of the Court.

Q. You say when you approached it that this boat

(Testimony of Captain Alfred Knutson.)

changed its course—in what direction did she go?

A. She came direct towards us, and I stopped—

Q. Then what happened?

A. I turned direct around; I stopped the engine and turned around.

Q. What caused you to stop, if anything?

A. I know the boat was coming towards us so I stopped—I thought he would come up alongside.

Q. What did you see, if anything, on the boat? See any men?

A. Well, when they got closer I could see they covered up her name.

Q. Did you see them do anything else?

A. I don't remember plainly now—it was so long ago, but I could see a fellow come out of the house, and he had a gun.

Q. Saw a fellow come out, and where did he come to—what part of the boat?

A. He come out of the pilot-house out on to the deck.

Q. With a gun, and what did he do?

A. Well, he got out on the deck with his gun, and he was setting something up against the rail there, little square plates,—of course what it was made of I couldn't say.

Q. Setting some square plates up against the rail of the boat? A. Exactly.

Q. Was that on the side next to you or the other side? A. The side next to me.

Q. And you saw him getting these plates and setting them up. Now, like this table is the deck of the

(Testimony of Captain Alfred Knutson.)

boat and this paper represents the plates, show how he set it up.

A. He set it up against the rail like this. [23]

Q. Set it up against the rail on the outside of the boat? A. No, on the inside.

Q. Did he set the bottom of it,—

A. For instance, this is the rail; he set it right up against the rail like this—this is the deck—you could see the top of it all the way around.

Q. You say that was on the side next to where you were? A. Yes, sir.

Q. Did you hear any words said at that time?

A. Well, I couldn't hear plainly what he said.

Q. Not plainly, but could you hear words?

A. I went right ahead with the boat.

Q. When you saw the gun and these plates—

A. I give a signal to the engineer to go ahead, and we went ahead, and they kind of crossed our stern, and they said something but I could not hear what they did say.

Q. You were giving orders to steer your boat away farther from there at that time? A. I was; yes.

Q. Did they come up ahead or astern of you?

A. No, they came across our stern again—they come up broadside, and as I went ahead, you know, they come across our stern, or back of us.

Q. Were these words that you heard spoken friendly words or angry words, or what?

A. I couldn't say—I couldn't make out anything that they did say because I couldn't hear it.

Q. Why did you turn and leave then after you had

(Testimony of Captain Alfred Knutson.)

hailed them and they came up there,—why did you turn and leave so suddenly?

A. Well, I recognized that this was the same boat that shot on the 8th, and when I see their actions I got away.

Q. When you saw their actions—what do you refer to?

A. Action,—when a man gets out his gun and sets it up I didn't think much of it and I went on. [24]

Q. That is the reason you turned your boat then?

A. That is the reason.

Q. On seeing them put these plates out?

A. That is the reason.

Q. How many plates did you see them put out?

A. One, as far as I remember.

Q. Did you see any other men on the boat at that time?

A. I don't remember plainly whether I saw one or two.

Q. What description of a man was this that you saw with the gun—what was his general build?

A. I couldn't say exactly.

Q. What position was he occupying—was he standing up straight, or otherwise?

A. Well, he was out on deck there—I don't remember whether he was standing still—I couldn't remember every motion that he made and describe it right here—I couldn't do it.

Q. You remember seeing him standing on the deck?

(Testimony of Captain Alfred Knutson.)

A. I remember him coming out of the pilot-house with the gun.

Q. Now, on the morning at Admiralty Cove when the firing was going on, did you see any men on deck at that time?

A. Well, I don't remember,—I believe I saw one but I don't remember now plainly.

Q. Captain, I will ask you whether you noticed whether or not this boat that was doing the shooting at the "Forrester" on the 8th of July that you have described was flying any flag at that time?

A. Well, she had a red piece of cloth upon the mast.

Q. A red piece of cloth on her mast? A. Yes.

Mr. SMISER.—Take the witness.

Cross-examination.

(By Mr. RODEN.)

Q. You didn't testify to that in the trial of the United States against Ernest Stage, did you, Captain?

A. I don't know—I suppose I wasn't asked that.
[25]

Q. You didn't testify about that, either, when the case was tried against Stage last fall, did you?

A. I don't know—I guess you didn't ask for it if I didn't testify to it,—it was so.

Q. All of this that you have testified to, this first portion of your testimony, was on the 8th of July, was it?

A. 8th of July,—explain that question.

Q. I say the first part of your testimony, everything that related to what you testified to hap-

(Testimony of Captain Alfred Knutson.)

pened in Admiralty Cove—I mean that portion of your testimony—happened on the 8th day of July?

A. The shooting; yes.

Q. And on the 10th day of July is when you did the chasing up around the Sisters?

A. The 10th, yes, sir—it was the 10th.

Q. Now, you were awakened about 5 o'clock in the morning, I understand you to say?

A. About that—about five.

Q. About that time, and you got up, and what was the first thing you did.

A. Well, I got up and went into the pilot-house.

Q. You were sleeping just back of the pilot-house, I suppose? A. Yes.

Q. And where did you see the boat then?

A. It was out in the water there, just about where I described it there.

Q. About how far away?

A. That distance is pretty hard to say—I didn't go out to take any measurement.

Q. I know you didn't—you say now it was about 2,000 feet?

A. It probably was 2,000, and maybe it was more or less. I couldn't say exactly.

Q. And the time you testified here last fall in the case against Stage, you stated it was between three and four thousand feet, [26] didn't you?

A. I don't know the distance—I didn't go out with any tape measure.

Q. Did you say that? A. What is that?

Q. At the time you testified before against Stage

(Testimony of Captain Alfred Knutson.)

you testified it was between three and four thousand feet distance from where you were on the boat to the "Forrester"?

A. Maybe I did—I never measured it at all. I didn't tell the exact distance at that time.

Q. I know you didn't measure it—it may have been three or four thousand feet?

A. I couldn't say.

Q. May it have been that far?

A. I couldn't say.

Q. Did you say it last fall when you testified against Stage,—yes or no?

A. I gave you the estimated distance.

Q. I asked you whether you said it was between three and four thousand feet?

A. Maybe it was; I don't know.

Q. I am not asking you maybe it was. I am asking you when you testified against Stage last fall if you did not say that it was between three and four thousand feet from the "Forrester" to where that boat was?

A. Probably I testified to that because probably I remembered the distances better then than I do now.

Q. And after you saw the boat out there, what did you do?

A. As I testified, I went down in the forecastle.

Q. Went down the forecastle?

A. Forecastle, where the crew was sleeping.

Q. Did you call up any of the boys below before you went down to the forecastle,—did you call up

(Testimony of Captain Alfred Knutson.)

anybody from the pilot-house before you went below? A. No, I had to go down there. [27]

Q. Didn't wake anybody up before you went down? A. I had to go down—

Q. Just answer the question,—you didn't wake anybody up before you went down to the fore-castle?

A. I couldn't call anybody in the fore-castle.

Q. Why didn't you say no, you didn't.

A. No,—I couldn't call them, unless I went down.

Q. You didn't call anybody, is that it?

A. I had to go down there to wake them.

Q. You didn't call anybody?

A. Not until I went down there; no, sir.

Q. Did you call Ellison?

A. He wasn't sleeping in the fore-castle.

Q. I am not asking you where he was sleeping,—I didn't say he was sleeping in the fore-castle, did I?

Mr. SMISER.—The witness understood you evidently to ask him if he woke up anybody in the fore-castle.

Mr. RODEN.—It doesn't make any difference what he understands.

Mr. SMISER.—The witness understood you to say down in the fore-castle where he was sleeping.

The WITNESS.—Certainly, I want to understand that.

The COURT.—The difficulty is that neither the questioner nor the witness waits until the question or answer is finished. You wait until Mr. Roden

(Testimony of Captain Alfred Knutson.)

gets through with his question, and then remember what the question is, and answer the question.

Q. (By Mr. RODEN.) I am asking you now, Captain, if you called anybody before you left the pilot-house?

A. If I called anybody? I may have called Ellison, but I don't remember for sure whether I called him before I went down or after I come back—I couldn't remember that.

Q. You didn't call anybody else except Mr. Ellison?

A. I possibly called Ellison—he was sleeping in the same room I was. [28]

Q. Didn't you holler to the cook, too?

A. I maybe did.

Q. You may have done it?

A. I may have done it; I couldn't say.

Q. Well, did you do it?

A. Well, I don't remember now—I maybe did.

Q. Where was the cook?

A. He was sleeping in his little stateroom there.

Q. Where was that with reference to the pilot-house?

A. There was just a partition between mine and his—just a thin partition.

Q. How long is the boat "Forrester"?

A. Well, I never measured, but I should think she is around 75—I don't think she is full 75.

Q. And what is her beam?

A. Well, that I don't know exactly, either.

Q. Well, you have been the master of the boat;

(Testimony of Captain Alfred Knutson.)

you have measured the boat, haven't you?

A. No, I never measured up the boat myself—no, I haven't, but I should judge she is around 15 feet beam.

Q. How long was the scow that was laying alongside of you?

A. Well, I never measured the scow, either, but I should judge it would be around 60 feet.

Q. Now, did you mean to say that the deck of the scow was even or below the deck of the "Forrester,"—even with the deck of the "Forrester" or was below the deck of the "Forrester" in the water? A. The deck of the scow?

Q. Yes.

A. Is about even with the deck of the "Forrester," is that what you mean?

Q. Yes,—that is what I am trying to find out.

A. You mean from the water?

Q. In the water, as the scow was on the morning of the 8th and as the "Forrester" was, was the deck of the scow level with the [29] deck of the "Forrester"? A. No.

Q. Which was higher?

A. Well, I think the deck of the "Forrester" is higher.

Q. You think the deck of the "Forrester" is higher than the scow?

A. Exactly—the pump-deck is amidships.

Q. I am talking about the main deck of the "Forrester." A. The main deck?

Q. Yes.

(Testimony of Captain Alfred Knutson.)

A. Do you know how she is constructed?

Q. Yes, I know how she is constructed.

A. You know she is built up amidships?

Q. Yes.

A. As far as I remember, the deck is built up a little higher than the deck of the scow,—you know how a box is built on a fish scow?

Q. Yes, I know how a box is built up, and it was considerably higher than the deck of the boat?

A. That would depend upon the boat.

Q. Certainly it would. You say the deck of the “Forrester” was higher than the deck of the scow?

A. I think amidships of the “Forrester” it was.

Q. Amidships, all right. How was it forward of the pilot-house? A. Forward is lower again.

Q. Which is lower? A. The deck is lower.

Q. How much lower was that?

A. I couldn’t say exactly.

Q. How much lower?

A. Probably a foot or a foot and a half—maybe two feet, maybe more, I couldn’t say—I never measured it.

Q. Now, the pilot-house is raised on the “Forrester,” isn’t it?

A. Raised? I don’t know what you mean—what do you mean by raised? [30]

Q. Is the floor of the pilot-house level with the deck of the boat where you enter the forecastle?

A. No.

Q. How much higher is it?

A. Must be quite a bit.

(Testimony of Captain Alfred Knutson.)

Q. How much? Give us an idea.

A. Give you an idea? Two or three feet—I couldn't give you exactly to the inch.

Q. I know you never measured it exactly.

A. I never did measure it.

Q. Two or three feet?

A. Something like that.

Q. Now, you had to step out of the pilot-house down about two or three feet before you could go to the fore-castle, didn't you?

A. Well, you have seen her, how she is constructed there—one step from the pilot-house down to the pump-deck, and then there is two steps again down to the forward deck—the forward hatches, then you go forward to the fore-castle.

Q. So the pilot-house floor is two or three feet higher than the deck where you go into the fore-castle? A. Yes, about that, I should say.

Q. How far does the raised deck on which the pilot-house stands on the "Forrester" extend in front of the pilot-house? A. Not very much.

Q. A couple of feet?

A. No, I couldn't say if there was that much or less—maybe it is 2 feet, I couldn't say. There is a little extension.

Q. And the pilot-house is located about amidships upon the "Forrester," a little bit forward?

A. Forward.

Q. All right,—and as you say, the "Forrester" is about 70 or 75 feet long?

A. Approximately—I don't think she is full 70.

(Testimony of Captain Alfred Knutson.)

Q. Where is the forecastle, as to distance, between the pilot-house [31] and the bow of the boat?

A. I never measured that distance, either, but I would judge about 10 to 12 feet.

Q. 10 to 12 feet? A. I would judge that.

Q. So in order to get into the forecastle from where you were in the pilot-house, you would take one step to the pump-deck, then you would take two steps to the other deck, then you would walk about 10 feet to get to the forecastle-head?

A. Yes, just exactly.

Q. Now, this box that is on top of the scow, what is that made out of? A. Made out of lumber.

Q. How thick is that lumber?

A. About 2-inch lumber, I guess—2-inch planks.

Q. Two-inch planks, and it practically covers all of the scow except two or three feet in the stern and the bow, and two or three inches on the side to enable a man to walk around? A. Yes, sir.

Q. And did it have a partition in there?

A. There are bins in there.

Q. Yes, they are divided by that 2-inch lumber—those two-inch boards?

A. I think that is what it is, 2-inch boards.

Q. Now, then, after you went to the forecastle you came back and had the engine started up?

A. Yes, sir.

Q. You gave the signal from the pilot-house, I suppose?

A. That I don't remember whether I gave a

(Testimony of Captain Alfred Knutson.)

signal from the pilot-house—I didn't go down, I know that, but I don't remember. I used to give signals sometimes, and other times I used to holler down the door.

Q. Now, then, you started up the engine for what purpose? A. To get out. [32]

Q. To get out? A. Yes.

Q. You were afraid?

A. Yes, I was kind of leary.

Q. Now, you testified at the preliminary hearing that took place in this case before Mr. Burton, on the 29th day of July last past, didn't you?

A. Well, yes, I was at the preliminary hearing,—28th, wasn't it? I don't remember the day.

Q. All right, let it be the 28th; and Mr. Burton asked you some questions? A. Yes, he did.

Q. And you answer them—answered his questions—he asked you what you were doing, and didn't you say to him that you reported to the engineer and told him to start to pull out and see who it was, did you say that at that time?

A. I told the engineer to pull out?

Q. Yes, so you could see who it was doing the shooting?

A. I don't remember whether the engine started for that purpose—I wanted to get out.

Q. But you didn't want to go out there to see who was doing the shooting?

A. Well, that was the intention about it, of course.

(Testimony of Captain Alfred Knutson.)

Q. Yes, but for the purpose of getting out of the way?

A. Well, for the purpose of getting out of the way—what do you mean—from where I was laying?

Q. How is that?

A. You mean from where I was laying? Of course they had to have the engine start to get out before you could do anything.

Q. Yes, I know that, but what was your purpose of going out?

A. Well, for the purpose of going out—to have the engine going for the purpose of going out.

Q. Why did you want to go out?

A. To go out.

Q. Well, why? [33] A. Why?

Q. Yes.

A. Well, I wanted to see who they were and get out of there,

Q. Were you afraid?

A. I don't remember now, whether I was afraid or not.

Q. But you didn't want to go out to see who was doing the shooting, did you?

A. Well, it was the intention to go out there.

Q. To see who was doing the shooting?

A. I shouldn't wonder.

Q. Don't you know now what purpose you went out for? A. I don't remember.

Q. You told Mr. Smiser here a few minutes ago that you went out because you were afraid?

(Testimony of Captain Alfred Knutson.)

A. I was afraid at the same time.

Q. But you told Judge Burton you went out there to see who was doing the shooting?

A. Who wouldn't be afraid?

Q. I am not asking you who wouldn't be afraid—you didn't tell Judge Burton you went out there to see who was doing the shooting?

A. Nobody started to shoot at me.

Q. Tell me whether you told him or not.

A. I suppose I told him if it is in the statement. I cannot remember every word I said six months ago—what do you expect?

Q. But you didn't go out to see who was doing the shooting—you went out to get away, didn't you?

A. No, I didn't go out, because I stopped the engine again.

Q. But you started the engine to get out of the way because you were afraid? A. Yes.

Q. That is the only reason you started the engine up? A. I started the engine up; yes.

Q. How well could you distinguish the boat three or four thousand feet distant? [34]

A. I could recognize that boat; yes.

Q. You could distinguish it very well?

A. Oh, well, it was broad daylight, sir—clear weather.

Q. And you knew then it was the "Diana," did you?

A. I recognized it to be the "Diana."

Q. Right there and then? A. I did.

(Testimony of Captain Alfred Knutson.)

Q. In what direction did the "Diana" go then after you shut down the engine?

A. Well, what course she was on I couldn't say. I explained it on the blackboard as close as I could.

Q. All right—tell us again, then which way the "Diana" went. A. All right; I will do that.

Q. You don't have to go over there—tell us in a general way.

A. I thought you wanted me to show you.

Q. All right, go and show us.

A. She was heading out this direction, but I couldn't tell exactly how close to the trap or how far out she was in this direction.

Q. So when you first saw her she was about opposite the trap Number 1, is that correct?

A. No, she was just opposite of the Bay trap here.

Q. Opposite the bay trap? A. Yes.

Q. All right, then, she went out past that No. 1 towards Funtier Bay?

A. Well, now, towards Funtier Bay, no—Funtier Bay would be back here, according to the locality of the country there. She did not hit for Funtier Bay, you see. You see, Sisters lays out here, and she was heading about for Icy Straits.

Q. All right. She was heading for Icy Straits, then,—all right. Now, you may sit down again. Now, I will ask you at the time of that preliminary hearing, on the 28th day of July, last year, if Judge Burton didn't ask you this question, and if you didn't give the following answer. He asked you, "You say you recognized [35] the boat—what

(Testimony of Captain Alfred Knutson.)

boat was it?" And you answered, "I noticed her down here at the float, the 'Diana' "—did you say that? A. At the preliminary hearing?

Q. Yes. A. Those questions?

A. Yes.

A. I guess they are. I don't remember the exact questions that was put there, where that was said—six months ago or seven months ago.

Q. Who was the engineer on that "Forrester"?

A. A fellow by the name of Bartell.

Q. Now, as engineer he came with you to the preliminary hearing, didn't he?

A. Yes, he was in there.

Q. Now, he went with you into the District Attorney's office?

Mr. SMISER.—I object—that is not cross-examination, if the Court please.

The COURT.—Objection sustained.

Mr. RODEN.—I am laying the foundation for an impeaching question, your Honor.

The COURT.—He hasn't testified to anything that happened in the District Attorney's office.

Mr. RODEN.—No, I am going to ask him if there wasn't a conversation in the District Attorney's office in which he made a certain statement.

The COURT.—Then ask him the direct question, didn't he say so and so at such and such a time, and in the presence of so and so, but I cannot tell whether it is preliminary or not. I have to rule on objections the way they are presented to me, and the way this is presented I cannot see any connec-

(Testimony of Captain Alfred Knutson.)

tion—just ask the direct question.

Q. (By Mr. RODEN.) Shortly before the preliminary examination, [36] before Judge Burton, didn't you and the engineer, whose name you say is Bartell, go into the District Attorney's office and tell the District Attorney, upon asking what the boat was, the engineer said the boat was so far out that we couldn't recognize her, and then the District Attorney said, "You can go, I don't want you"?

Mr. SMISER.—I object to that as not cross-examination, if the Court please.

The COURT.—The objection is sustained. Anything that the witness said of course you can impeach him on, but anything that the engineer said, or that somebody else said, is not impeachment.

Q. You couldn't tell that morning, honestly, now, what boat that was, could you? A. Yes, sir.

Q. You could? A. Yes, sir.

Q. No question about it? A. No.

Q. Four thousand feet away?

A. I could tell it.

Q. Then why did you go and hunt her up on the 10th, two days afterwards, if you knew what boat it was? A. Yes.

Q. Why did you hunt it up again?

A. I recognized it would be the same boat.

Q. What was your object,—you knew what boat it was before? A. Yes.

Q. You knew her name?

A. I knew her name.

(Testimony of Captain Alfred Knutson.)

Q. Then what did you go out in Icy Straits, around the Sisters there, to see what her name was for?

A. Well, I wanted to see her, yes, to see what her name was.

Q. Why?

A. She might have changed her name by that time. [37]

Q. She might have changed her name?

A. She might have—I don't know—you couldn't prove it by me because I never saw the name; all the time the name was covered up.

Q. Was the name of the boat covered up on the stern?

A. I didn't see the name on the stern—they covered up the name on the bow.

Q. You were chasing her?

A. I wasn't chasing her—I was trying to hail her.

Q. The first time you saw her she was heading for you, was she?

A. Yes, sure—ask that question again.

Q. The first time you saw the boat at the Sisters she was heading toward you?

A. No, she wasn't.

Q. Where was she? A. She was running.

Q. Which way was she heading?

A. Heading down Icy Straits.

Q. She was running away from you, wasn't she?

A. No, she was pretty near at an angle with us.

Q. Going away from you?

A. She wasn't going the same course we were; no.

(Testimony of Captain Alfred Knutson.)

Q. How long did you keep after her?

A. Well, I run awhile—I don't know how long I did run.

Q. How long did you follow her?

A. Oh, I couldn't say how long—thirty minutes, probably. I was steering the course.

Q. How close did you get up to her then?

A. When she turned around?

Q. No, after you followed her for thirty minutes?

A. I got closer to her, yes.

Q. How close?

A. It is hard to say how close—how close it is across the bay here. I don't know. I couldn't give you the exact distance— [38] it is pretty hard to do.

Q. How long have you been a captain?

A. Three or four years.

Q. Been on the water every season?

A. I have been on the water quite a few years.

Q. Quite a few years before that?

A. Quite a few years before that, you bet.

Q. You ought to be able to give us an estimate fairly accurate of distances.

A. If I say the distance a quarter of a mile or half a mile it would probably be just as close.

Q. The "Diana" was half a mile from you after you chased her for thirty minutes?

A. When she turned around?

Q. I don't know whether she turned around or not. After you chased her for thirty minutes—you said you were chasing her for thirty minutes?

(Testimony of Captain Alfred Knutson.)

A. I was running my course for thirty minutes; yes.

Q. How close were you to her then?

A. I could say in a distance of probably a quarter of a mile then.

Q. You couldn't see her name then?

A. No.

Q. You could see her stern?

A. I could see the stern of the boat; yes.

Q. Was her name on the stern?

A. I don't know.

Q. You had glasses, didn't you?

A. I had glasses, yes, but I didn't use them right at that minute.

Q. Didn't use the glasses?

A. Not at that moment; no.

Q. Did she turn around and come toward you?

A. Yes.

Q. How long was that plate on the rail that they brought forth?

A. I don't know how long they were—I should judge they were [39] a couple of feet—two or three feet.

Q. And how high, about?

A. They come just above her rail.

Q. How high above the rail?

A. Probably a foot or something like that.

Q. And they put one of those in place?

A. What is it?

Q. I say they put one of those plates against the rail?

(Testimony of Captain Alfred Knutson.)

A. As far as I can remember, yes, there was one—if there was any more I don't remember.

Q. What was the closest you ever came to them?

A. That day?

Q. Yes.

A. When I turned around they come up alongside, pretty nearly abeam of us.

Q. They came within a few feet of you?

A. No.

Q. You said they came alongside—what do you mean by coming alongside?

A. They were abeam of us.

Q. How far a distance?

A. Oh, I should judge a thousand or 1500 feet.

Q. A thousand or 1500 feet?

A. Something like that.

Q. Could you see the name then?

A. No, they covered it up.

Q. The name on the stern, was that covered up too?

A. I couldn't see the name on the stern—I couldn't see the stern.

Q. You couldn't see the stern. Couldn't you maneuver with the "Forrester" so that you could see the stern of the "Diana"?

A. No; I could see the side of it.

Q. You couldn't change your position any?

A. My position? [40]

Q. Yes.

A. Maybe—we were laying abeam like.

Q. What is the speed of the "Forrester"?

(Testimony of Captain Alfred Knutson.)

A. Why, I guess 7 or 8 miles—9 miles—an average, light.

Q. Light? A. Light, without any tow.

Q. She could overtake the "Diana," couldn't she?

A. Oh, yes, I guess so—I don't know the speed of the "Diana."

Q. You couldn't hear anything that was said on the "Diana"?

A. They were hollering something but what they did say I couldn't hear.

Q. Couldn't understand? A. I couldn't hear.

Q. Now, the scratch that you found on the anchor plate, what kind of a scratch was that?

A. It was a bullet mark.

Q. You are positive of that? A. Yes.

Q. That is a plate that is made out of sheet iron, isn't it? A. It is an iron plate.

Q. Last week you testified it was tin, didn't you?

A. If you want to go down and look at it you can see it.

Q. Last week you testified it was tin, didn't you?

A. No,—as far as I know I didn't—tin?

Q. Yes.

A. No, they don't use tin. Tin wouldn't do.

Q. You didn't say last week it was tin?

A. No, I didn't say it was tin.

Q. You don't remember now which door you went out of in the pilot-house to go down to the fore-castle the first time?

A. Not plainly I don't remember it now. I went

(Testimony of Captain Alfred Knutson.)

out, yes, but which side I went out I don't remember.

Q. How far is the front of the pilot-house from the door?

A. Ask that question again,—I went up forward, you know. [41]

Q. The front of the pilot-house is round, isn't it?

A. No, it isn't exactly round.

Q. How is it?

A. Well, you have seen her, haven't you?

Q. I am not giving testimony here. You are giving testimony. I want to know the shape of the pilot-house.

A. You have seen her. You said it was round—it isn't round.

Q. How is it—is it square?

A. No, it isn't square either.

Q. How is it?

A. The corner of the pilot-house is kind of rounded off.

Q. Now, Captain, I am not trying to mislead you.

A. No, I am not up here for an argument.

Q. Well, let us draw a line in front of the pilot-house, and then try to find out how far it is from the door to that line—in other words, how far would you have to walk to get flush with the front of the pilot-house?

A. From the fore part of the door to the fore part of the pilot-house cannot be very far.

Q. A couple of feet?

A. Of course the door goes up to about two or

(Testimony of Captain Alfred Knutson.)

three inches from the window of the pilot-house.
This is the window.

Q. How far is it from the door to the front of the pilot-house?

A. There is only one window in there, and then you have the front of the pilot-house.

Q. Tell me how far it is according to your best judgment.

A. My best judgment—I wouldn't say—possibly it was 2 feet, possibly it wasn't that much.

Q. And I suppose there is a door on each side of the pilot-house? A. A door on each side.

Q. And one in the back?

A. That door in the back goes into that little state-room where I sleep. [42]

Q. You saw a man come out of the pilot-house on the "Diana" on the 10th day of July didn't you?

A. Yes.

Q. What door of that pilot-house did he come out of?

A. I see him just as he got out of the clear of the pilot-house.

Q. What side—port side or starboard side?

A. That I don't remember. I just seen him as he got out in the open.

Q. You saw the door open?

A. I just saw him as he got out in the open.

Q. You could not see whether he came out from the port side or out from the starboard side?

A. I don't remember.

(Testimony of Captain Alfred Knutson.)

Q. Who was in your pilot-house when you saw them on the 10th?

A. Well, I don't remember if there was anybody in with me—probably Dr. Borland was in with me.

Q. Who was at the wheel?

A. As far as I remember I was at the wheel myself.

Q. You were at the wheel yourself? A. Yes.

Q. You told Mr. Smiser here a little while ago that you gave orders to steer your boat away from there. Who did you give those orders to? A. Orders?

Q. Yes.

A. Well, I give orders—signals for the engine-man to go ahead. I didn't hear that.

A. I give the signals down to the engineer, of course.

Q. Yes, but you didn't give any orders for anybody to steer your boat away from there, did you?

A. The chances are there was somebody at the wheel—I don't know. Of course I give orders. I just signaled to the engineer to go ahead.

Q. Why didn't you tell him you gave signals to the engineer—what did you tell him you gave orders for?
[43]

A. Give orders,—I had the engine going ahead if I wanted to go out.

Q. Yes, but the engine wouldn't steer the boat, would it?

A. The engine wouldn't steer the boat, but it sets her ahead.

(Testimony of Captain Alfred Knutson.)

Q. It would take her astern, too, wouldn't it, as well as ahead?

A. I guess if you give her the signal to go astern she will go astern.

Q. How much of a crew did you have on the boat at that time? A. I cannot hear you.

Q. How many were there in your crew on the 10th?

A. I believe there was 13 with me.

Q. How many did you have on the 8th?

A. We had 13.

(Whereupon court adjourned until 10 o'clock A. M.)

MORNING SESSION.

February 11, 1920, 10 A. M.

ALFRED KNUTSON on the witness-stand.

Cross-examination (Cont'd).

(By Mr. RODEN.)

Q. Captain, I would just like to ask you one or two more questions. Now on what side of the boat was this plate that you saw damaged—that the bullet hit?

A. On the "Forrester"?

Q. Yes.

A. It was on the port side.

Q. About what time of day was it when you were chasing the "Diana," as you say, on the 10th, around the Sisters?

A. I wasn't chasing her—I wanted to hail her—I didn't chase nobody.

Q. All right; you wanted to hail her?

A. Yes, sir.

(Testimony of Captain Alfred Knutson.)

Q. What time of day was that?

A. I don't remember exactly, but it was around in the afternoon. [44]

Q. Early or late in the afternoon?

A. Kind of late, I guess.

Q. Four or five o'clock.

A. Probably somewheres around there, but I couldn't remember plainly the exact time.

Mr. RODEN.—Around about that time. That is all.

Redirect Examination.

(By Mr. SMISER.)

Q. Which side of the boat was this mark on with reference to the boat that was doing the shooting?

A. I don't understand that plainly, Mr. Smiser—which side?

Q. If I understood you, you said it was on the port side, did you?

A. Yes, sir; that is the plate on the "Forrester"?

Q. Yes.

A. That was naturally on the port side.

Q. Was that the side next to the boat that was doing the shooting, or the side away from the boat that was doing the shooting?

A. No, on the side that was doing the shooting—facing the boat.

Mr. SMISER.—That is all.

(Witness excused.)

Testimony of Sofus Ellison, for the Government.

SOFUS ELLISON, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. SMISER.)

Q. Please state your name.

A. Sofus Ellison.

Q. Where were you employed during the month of July, 1919?

A. I was employed in Hoonah, for the Hoonah Packing Company.

Q. In what capacity were you working—what were you doing? [45] A. I was foreman.

Q. Do you know a boat called the "Forrester"?

A. Yes, sir.

Q. Do you know where that boat was on July 8th, in the morning? A. Yes, sir, I do.

Q. Where was it?

A. She was at Admiralty Cove.

Q. Where were you at that time?

A. I was on the boat.

Q. Who was captain of the boat?

A. Alfred Knutson.

Q. When did you go to Admiralty Cove on the boat? A. I went there on the 7th of July.

Q. Did you remain there the night of the 7th?

A. Yes, sir.

Q. Where was the boat located at that point?

(Testimony of Sofus Ellison.)

A. It was hanging on to a dolphin at Admiralty trap—alongside of Admiralty trap.

Q. Were there any other men on the boat besides you and Captain Knutson? A. Yes, sir, there was.

Q. How many? A. There was 13 altogether.

Q. Did you sleep on the boat that night?

A. Yes.

Q. The 7th? A. Yes.

Q. Where did you sleep?

A. I slept in a stateroom right behind the pilot-house.

Q. Where did Captain Knutson sleep?

A. He slept in the same room.

Q. Where did the engineer sleep?

A. He slept below the deck aft.

Q. Where did the other men on the boat sleep?

[46]

A. The rest of the crew was sleeping in the fore-castle except the cook.

Q. Where did he sleep?

A. He was sleeping in a stateroom behind us, a little farther aft.

Q. The stateroom behind the—

A. Behind the pilot-house.

Q. Now what time in the morning did you wake up on the 8th of July? A. I woke up around 5 o'clock.

Q. Do you remember what woke you?

A. Well, the captain woke me up.

Q. What was the occasion of his waking you—what caused him to wake you?

A. Well, he said there was a pirate boat around.

(Testimony of Sofus Ellison.)

Q. What did you do upon being awakened?

A. I took it kind of easy in the start—I didn't went up right away.

Q. Did you get up out of bed?

A. Well, later on, yes; I got up a few minutes after he called me.

Q. Just a few minutes? A. Yes.

Q. What did the captain do after calling you?

A. He went out of the pilot-house—I noticed he was out, of course, because he was out even when I got up.

Q. I will ask you if at that time you heard any shots? A. Yes, sir, I did.

Q. How long did the captain remain out of the pilot-house?

A. Oh, I couldn't say exactly, you know, but a couple of minutes, I guess—around there.

Q. When he came back which way did he come?

A. He came in on the port side.

Q. From what direction?

A. I couldn't say what direction he come from.

Q. Had you gotten up then? [47]

A. Because I just got up in the pilot-house when he came in.

Q. What did he do, if anything, when he came back to where you were,—what did the captain do?

A. Well, when I got out the engine was running.

Q. What did he do?

A. The engine started up and so I asked the captain where he was going.

Q. Well, what was done then?

(Testimony of Sofus Ellison.)

A. Well, he says he was going out, he says. Well, I says, "I believe that is poor policy to do that."

Q. Why was that?

A. Because I says, "If I was you," I says, "I wouldn't take chances on it."

Q. Wouldn't take chances on it?

A. That is what I told him.

Q. Was there shooting going on at that time?

A. Yes, sir, there was.

Q. What did he do after that?

A. He went out of the same door again, on the port side, and went back and told the engineer to stop the engine.

Q. Now, I will ask you if he remained in the pilot-house after that—the captain?

A. He came in again, yes, and he said, "This is no place to be here"; he says, "We better duck below," when he came in there, so I told him I for my part wanted to stay right here, because, I says, "The bullets is coming too thick outside for me to go out."

Q. What did he do? A. He went out.

Q. Which way did he go?

A. The same door, on the port side, and he was going to the forecastle.

Q. Did you see him when he was going from the door to the forecastle? A. Yes, sir, I did.

Q. Well, now, what, if anything, happened while he was going? [48]

A. Well, there was a bullet come across.

Q. How do you know that?

A. Because I hear the whistle of the bullet.

(Testimony of Sofus Ellison.)

Q. What did you see captain do, if anything?

A. Just when he got around the corner of the pilot-house he kind of fell back—that is all he did, you know.

Q. Fell back?

A. Yes, he fell backwards.

Q. Did he fall on the deck?

A. He fell on the deck, yes, sir.

Q. And where were you standing at that time?

A. I was standing right in the pilot-house.

Q. Was there a window there?

A. Yes, sir, there was a window.

Q. Could you see through the window?

A. Yes.

Q. After he fell, what did you do?

A. Well, I looked out of the side where he fell—you know, I thought sure the bullet hit him.

Q. You thought the bullet had hit him?

A. That is just what I did.

Mr. HUBBARD.—Now, if the Court please, I object to his stating what he thought about the matter.

The COURT.—The objection is sustained.

Mr. HUBBARD.—I move to strike the answer of the witness out.

Mr. SMISER.—All right.

Q. When he fell what did he do, if anything?

A. He got up and went to the forecastle.

Q. How far away from the forecastle about was he when he fell—how many feet?

A. I should judge about 14 or 15 feet.

(Testimony of Sofus Ellison.)

Q. Did he remain where he had fallen long, or did he get up immediately after falling? [49]

A. He got up immediately.

Q. And when he went toward the forecastle how was he traveling, slow or otherwise?

A. No, he was running, of course.

MR. HUBBARD.—I move to strike that out as immaterial, whether he was moving slowly or running.

THE COURT.—Overruled.

Q. During this particular part of the time I will ask you whether there were any shots being fired—whether the shooting was going on.

A. Yes, the shooting was going on.

Q. Could you tell where these shots were coming from?

A. Those shots I noticed came across the boat—came from this pirate boat, of course—came from that direction.

Q. Could you tell where any of the shots were striking with reference to the “Forrester”—in regard to the position of the “Forrester,” could you tell where any of these shots that were coming were striking?

A. Yes, some of them were striking on the upper side of the “Forrester,” between the shore and the water.

Q. How near to the “Forrester” was that where they were striking?

A. It wasn't very near in there—it was six or seven hundred feet—something like that.

(Testimony of Sofus Ellison.)

Q. Did you notice any nearer than that?

A. Well, I noticed one was stopped on the deck—struck on the deck.

Q. What was your first notice of that—how did you first notice that?

A. I saw it spinning on the forecastle-head.

Q. What time was that with reference to the time the captain was running to the forecastle?

A. Well, the captain was in the forecastle.

Q. What did this bullet that you saw spinning on the deck finally do—where did it finally land?
[50]

A. Well, just as she lost the speed she had, of course, she rolled down on the deck—on the main deck.

Q. Did you pick up that bullet at any time?

A. Yes, sir, I did, after the shooting was over.

Q. Where did you find it?

A. I found it on the side right by the step going down from the pilot-house down on the main deck.

Q. What did you do with it?

A. I picked it up.

Q. What did you do with it?

A. I turned it into the courtroom.

Q. Was that used in the trial of the other cases in this matter? A. Yes, sir.

Q. I will ask you to look at that bullet and state whether that is the one.

A. Yes, sir, that is the one.

Mr. SMISER.—I ask that it be filed as Plaintiff's Exhibit "A."

(Testimony of Sofus Ellison.)

Mr. HUBBARD.—No objection.

(Whereupon said bullet was received in evidence and marked Plaintiff's Exhibit "A.")

Q. Now, Mr. Ellison, you spoke of these bullets passing over the "Forrester" and striking beyond the "Forrester," on which side of the "Forrester" were these bullets striking?

A. They were striking on the port side.

Q. On which side was the boat that was doing the shooting located?

A. On the starboard side.

Q. Now, can you tell where these bullets were passing with reference to the "Forrester" in order to get to the place where they struck?

A. Why, I was mixed up there,—I believe the boat was on the port side and the bullets struck on the starboard side.

Q. Let us demonstrate that so we will not misunderstand each other. Place that piece of paper—let it represent the "Forrester."

Mr. HUBBARD.—If the Court please, I do not hardly think this [51] method of getting the testimony is correct. We cannot get into the record which we want to keep in this case, and I would like to have the witness testify so that the record will show what he is talking about.

The COURT.—I cannot see any objection to it. Of course it cannot get into the record, but there are many things that do not get into the record.

Q. Where was the "Forrester"?

(Testimony of Sofus Ellison.)

A. Here is the "Forrester," here is the bow and here is the stern.

Q. Now, place this paper in the direction of the boat that was doing the shooting.

A. There was the boat that was doing the shooting.

Q. Where were the bullets falling that you were speaking of? A. Up in here.

Q. Now, what direction? A. Right in here.

Q. Which side would it be that the bullets were falling, on the starboard side or port side?

Mr. HUBBARD.—I object to this. The witness has answered the question once, and there seems to be a disposition on the part of counsel not to be satisfied with his answer.

The COURT.—If you think there was any indefiniteness about it, ask the question again and let it be clear.

Q. The way you think it was—which is the port side? A. There is the port side.

Q. What is this? A. Starboard side.

Q. Where were the bullets striking with reference to the side of the "Forrester"?

A. On the starboard side.

Q. Now, could you tell where these bullets were passing with reference to this vessel to come from there over to the point—

Mr. HUBBARD.—I object to that question as too indefinite to answer what counsel is seeking to elucidate. [52]

The COURT.—I do not think so, Mr. Hubbard.

(Testimony of Sofus Ellison.)

Q. Could you tell where these bullets were passing with reference to the boat "Forrester," that came from the boat that was doing the shooting and landing on the starboard side,—that is, where did they pass in reference to the boat "Forrester"?

A. All I heard was passing between the pilot-house and the mast.

Q. Passing between the pilot-house and the mast? A. Yes, sir.

Q. After Captain Knutson went down into the forecandle the second time, did he remain there?

A. Yes, sir, he did.

Q. How long?

A. Until the shooting was over.

Q. Were the lines of the boat cut loose at the time the engine was started? A. No, sir.

Q. After the shooting was over was the boat still tied up? A. Yes.

Q. How long did the engine run?

A. Just about two or three minutes, I guess—something like that.

Q. While this shooting was going on, I will ask you if you looked out in the direction from which the shots were coming? A. Yes, sir, I did.

Q. What did you see?

A. Well, I saw this boat that was doing the firing.

Q. About how far off was it when you first saw it from the "Forrester"?

A. Around 2,000 or 2,500 feet, I guess.

Q. And what direction was it traveling?

(Testimony of Sofus Ellison.)

A. Well, she was traveling the same direction—towards us, of course, when the firing was first over.

Q. What did you do?

A. She was coming kind of to us. [53]

Q. Kind of towards you? A. Yes.

Q. How long did it continue to come in that direction? A. Not very long.

Q. What did it do then?

A. Well, they swung out.

Q. And which way did it go?

A. Slowly out from shore.

Q. During all the time, from the time you first saw it up until the time it pulled out from the shore, state whether or not the shooting was going on,—whether shooting was going on all that time.

A. The shooting was going on; yes.

Q. About how many shots would you say were fired?

A. Not for sure, I couldn't say, but between 40 and 50, anyhow.

Q. You think that is a conservative estimate?

A. Yes.

Q. Did you hear any other shots fired at that time except those coming from this boat?

A. Not as far as I noticed, because the shots that were fired—

Mr. HUBBARD.—We object—he has answered the question.

The COURT.—Yes.

Q. How long a time intervened from the time

(Testimony of Sofus Ellison.)

you first heard the shooting until the shooting ceased? A. Around 15 minutes, I guess.

Q. After the shooting was over did you at any time examine for bullet marks on the boat "Forrester"? A. Yes, sir, we did.

Q. When did you do that?

A. We done that when we got back from lifting the trap.

Q. What time was that in the day?

A. It was around 8 o'clock.

Q. Around 8 o'clock that morning?

A. Yes. [54]

Q. Did you find any bullet marks on the boat?

A. Yes, we found a mark in the sheet iron plate below the anchor chain.

Q. On which side was that?

A. That is on the port side.

Q. Describe that mark as best you can.

A. Well, it looked like a bullet being glanced—a bullet glancing on the plate—kind of dug in—paint and all was taken off—a shiny cut in the plate.

Q. I will ask you whether or not there was a scow near the boat at that time. A. Yes, sir.

Q. Where was it with reference to the boat during the time of the shooting?

The COURT.—With reference to which boat?

Mr. SMISER.—The "Forrester."

A. She was laying alongside of the "Forrester."

Q. Which side?

A. She was laying on the port side.

Q. Now, which side was that with reference to

(Testimony of Sofus Ellison.)

the boat that was doing the shooting?

A. It was the same side as the boat.

Q. Do you know how long the "Forrester" is?

A. She is around 75 feet.

Q. How long was the scow?

A. Well, I should judge the scow was between 60 and 70 feet, too—somewhere around there. I haven't measured any of them, but that is what I judge they are.

Q. Did you examine this scow at any time to see whether there were bullet marks on it?

A. Yes, sir, I did.

Q. What did you find?

A. I found three or four bullet holes.

Q. Which side of the scow were these bullet holes on? [55]

A. On the port side, of course, or on the outside from the boat.

Q. How did the deck of the scow compare with the deck of the boat in height above the water line?

A. Pretty close to the same height—a little lower, that on the boat, than the deck of the scow.

Q. Did the scow have any siding on it—planking? A. Yes.

Q. Where was that placed?

A. It was placed on top of the deck.

Q. How was this plank placed there?

A. Nailed to the stanchions—stanchions all around there, four and a half or five feet high.

Q. How did the top of the planking compare

(Testimony of Sofus Ellison.)

with the height of the main deck of the boat—was it as high, or was it higher or lower than the boat?

A. It was higher, of course.

Q. About how much higher?

A. Well, the bulwarks on the scow—it was 4 or 5 feet high—somewhere around there.

Q. About how much higher than the boat?

A. About 2 feet higher than the boat.

Q. Was it as high as the pilot-house?

A. Yes, it might be even with the floor of the pilot-house.

Q. The pilot-house, then, would be above the line of these planks? A. Yes.

Q. Did you remain at Admiralty Cove during that entire day, or did you leave there?

A. We left there.

Q. Did you usually stay or live at Admiralty Cove? A. No.

Q. Where did you stay?

A. I stayed in Hoonah.

Q. Now, at the time you saw this boat doing the shooting, I will ask you whether you saw any men on board. [56] A. No, sir, I didn't.

Q. Did you recognize the boat?

A. Yes, sir, I did.

Q. What boat was it?

A. I recognized it to be the "Diana."

Mr. SMISER.—Take the witness.

Cross-examination.

(By Mr. RODEN.)

Q. Now, all this happened on the morning of

(Testimony of Sofus Ellison.)

the 8th of July, Mr. Ellison, didn't it?

A. What?

Q. The trouble out there happened on the 8th of July? A. The 8th of July.

Q. About what time in the morning?

A. Around 5 o'clock.

Q. Which way was the "Forrester" lying at the dolphin—was she lying straight out, practically parallel to the shore line, or was her stern swung in any? A. The stern was swung in.

Q. And the scow was on the port side?

A. On the port side; yes.

Q. How much of the "Forrester" remained unprotected by the scow, about?

A. Well, I couldn't say for sure, but it may be the case the scow was laying a little behind the stern—maybe not—I couldn't say for sure, but there was at least 8 feet anyway uncovered, of the boat.

Q. At least 8 feet? A. Yes.

Q. May have been more?

A. May have been more, yes.

Q. May have been a little less?

A. No, I hardly think so.

Q. Think not? [57] A. No.

Q. May it not have been six feet?

A. No, I don't think so.

Q. You were examined at the preliminary hearing on the 28th day of July, weren't you, downstairs before Judge Burton? A. Yes.

Q. You testified down below, and didn't Mr.

(Testimony of Sofus Ellison.)

Smiser ask you this question, and didn't you give the following answer? The question is, "Was there a scow lying alongside of you?" And you said, "Yes, sir, we had a big 70-foot scow alongside of us, so there was only about 6 feet of the bow of the boat stuck ahead of the scow, and there was a bullet struck right below." Did you say that?

A. Yes, I guess I said that—it is a long time ago.

Q. As I understand the proposition, Mr. Ellison, the pilot-house stands on the pump-deck, doesn't it? A. Yes, sir.

Q. And the pump-deck is about how much higher than the main deck?

A. I should judge about 2 feet, at least.

Q. At the bow of the boat it is raised again, isn't it? A. Yes, sir.

Q. As you got to the forecastle-head it begins to raise? A. Yes.

Q. Now, a man would have to step, you say, about 2 feet to get from the pilot-house down on to the main deck?

A. He has got to step some—the floor in the pilothouse is about a foot over the pump-deck—about that. I never measured it.

Q. So you would have to step down two or three feet to get to the main deck? A. Correct.

Q. Which door did you say Captain Knutson went out of when he went to the forecastle the first time?

A. I believe I was mixed up there on the port

(Testimony of Sofus Ellison.)

and the starboard side, but he went out on the starboard side—that is the truth.

Q. Did he go out by the starboard door both times when he went out? [58]

A. When I saw him; yes.

Q. That is as near as you can recollect?

A. Yes; the port side door was never open so far as I saw.

Q. Out of what size material are these planks made that form the box on top of the scow?

A. What are they made of?

Q. Yes, how thick is the material?

A. Three inches.

Q. There are two sides to this box, then there is a partition through the scow—through the center? A. Yes, sir.

Q. Is that partition made out of 3-inch planks, too? A. No, sir, made out of 2 inch.

Q. Did I understand you to say, Mr. Ellison, that the deck of the scow is as high as the pump-deck?

A. No, the lower deck—just about even with the lower deck.

Q. The lower deck or the main deck?

A. Yes, the main deck.

Q. So. How high was the rail on the “Forester”?

A. The rail?

Q. Yes.

A. About 18 inches, I guess, around there—18 to 20 inches.

Q. And the box, you say, is about 5 feet high?

(Testimony of Sofus Ellison.)

A. Yes, I would say four or five feet.

Q. So the scow on the top of the box would be about how many feet—standing in the water,—now, what would be the distance from the top of the box on the scow to the floor of the main deck?

A. Between 4 and 5 feet.

Q. Between 4 and 5 feet?

A. Yes, around there.

Q. About what would you say was the distance from the pilot-house doors to the forecastle-head, where you say Captain Knutson went in? [59]

A. I couldn't say for sure, but from the pilot-house door to the forecastle, around 18 to 20 feet, I believe.

Q. And from there to the bow of the boat is about the said distance again?

A. It is more than that.

Q. More than that—would you say 20 to 22 feet?

A. It is 23 or 25 feet, the forecastle is.

Q. Now, where was this boat that was doing the shooting, Mr. Ellison, when you first saw her with reference to the location of the "Forrester"?

A. Well, she was right on the side of the "Forrester"—right out from the side of the "Forrester."

Q. Would you say she was abeam—abeam of the "Forrester," about?

A. No, not quite—not first when I saw her. It just come around the trap—by the trap.

Q. She was rather a little behind, then, I understand—about this way? A. Yes.

(Testimony of Sofus Ellison.)

Q. How fast was the boat that was doing the shooting going then? A. Not very fast.

Q. Half speed?

A. Well, I couldn't say for sure, but it was moving slow.

Q. And about where did you see her with reference to what is called the bay trap on the picture there when you first saw her?

A. Where was she?

Q. Yes, with reference to that where was she?

A. She was just about out from the bay trap when I first saw her; then she kept on until she got a little to the side of the "Forrester" before she swung out.

Q. Did she swing out before she came to trap No. 1? A. Yes, sir.

Q. And during that period you think there were about 40 or 50 shots fired—something like that?

A. Yes. [60]

Q. And it took about 20 or 25 minutes?

A. No, about 15 or 20 minutes.

Mr. RODEN.—That is all.

Redirect Examination.

(By Mr. SMISER.)

Q. I will ask if there was anything in the scow at the time of this shooting?

Mr. SMISER.—If the Court please, I want to ask this question which I omitted.

A. Yes.

Q. The scow that was lying on the side of the "Forrester"?

(Testimony of Sofus Ellison.)

A. There was 3,000 fish—3,000 or 4,000 fish, something like that.

Q. To whom did they belong?

A. They belonged to the Hoonah Packing Company.

Mr. SMISER.—That is all.

Recross-examination.

(By Mr. RODEN.)

Q. You didn't testify to that at the last trial, did you?

A. I don't remember if I was asked about it.

Q. Now, which direction did the boat that was doing the shooting go, Mr. Ellison, when she was through? A. She just went across the straits.

Q. Making for what, would you say—for what point over there?

A. Whitestone Harbor is the closest, I should say.

Mr. RODEN.—That is all.

(Witness excused.) [61]

Testimony of W. A. Borland, for the Government.

W. A. BORLAND, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. SMISER.)

Q. Please state your name.

A. W. A. Borland.

Q. Where do you live? A. Hoonah.

(Testimony of W. A. Borland.)

Q. What is your business? A. Physician.

Q. Do you practice medicine at Hoonah?

A. Yes, sir.

Q. Do you occupy any office there?

A. Yes, sir; Commissioner.

Q. United States Commissioner?

A. Yes, sir.

Q. Where were you on the 10th of July, 1919?

A. Well, I left the cannery on a boat bound for Admiralty Island.

Q. What boat? A. The "Forrester."

Q. Who was the captain of the boat?

A. Knutson.

Q. In making that trip I will ask you whether you encountered another boat or saw another boat?

A. Yes, sir.

Q. I will ask you what you did with reference to that boat after seeing it?

Mr. HUBBARD.—We will reserve an exception to this testimony as not being competent. It in no way tends to prove any of the allegations in the three counts of the indictment here—it is not relevant.

The COURT.—The objection will be overruled provided the defendant is connected with it. [62]

Mr. HUBBARD.—This witness does not claim to have been at Admiralty Cove at the time of the original transaction at all, which has been testified to by the other witnesses.

The COURT.—The defendant would not have to be connected by this witness.

Mr. HUBBARD.—I reserve an exception to the

(Testimony of W. A. Borland.)

testimony of the witness on this question.

A. One of the men came and reported to the captain,—

Mr. HUBBARD.—I object to that, if the Court please.

Q. (By Mr. SMISER.) Just tell what was done.

A. They changed their course and followed the boat.

Q. About how far off would you say the boat was at that time—at the time they changed the course and followed?

A. Two and one-half or three miles—something like that.

Q. How long did they continue to follow it?

A. Well, I think it was over an hour, perhaps—something like that.

Q. Did the Forrester boat have anything with it at that time? A. Had a scow.

Q. What was done with reference to the scow?

A. Well, after they had followed the boat a considerable time, they were not making very much headway, and Captain Knutson dropped the scow.

Q. Then what did they do?

A. As soon as the scow was dropped, we had probably gone a few hundred yards when the boat that we were following turned and came back across the bow of the “Forrester.”

Q. Came back across the bow of the “Forrester?”

A. Yes.

Q. Now describe what transpired between the two boats from there on.

(Testimony of W. A. Borland.)

A. Captain Knutson stopped the "Forrester," and the boat we were following turned across the bow and then stopped, and the men came out and covered up the name on the bow.

Q. What boat are you speaking of? [63]

A. The "Diana."

Q. Is that the boat that you had sighted?

A. That we were following; yes, sir.

Q. Go ahead—the men came out and did what?

A. They dropped a canvas over the name on the boat—or covered—I don't know whether it was canvas or not, and came out and placed up something against the gunwale of the boat—a square, I should judge, $2\frac{1}{2}$ or 3 feet square, and a man came out of the pilot-house with a gun, and one went up on the forecastle and the other was on the back of the pilot-house.

Q. How many men did you see?

A. I saw two at the time on the "Diana."

Q. I will ask you if anything was said by the men on the "Diana" at that time?

A. Yes, they hollered, "Come on, you square heads."

Q. Hollered, "Come on, you square heads."

A. Yes, sir.

Q. Was that at the time you saw the man with the gun? A. Just about that.

Q. Now, when Captain Knutson saw that what did he do?

A. Got scared, become frightened, turned the boat

(Testimony of W. A. Borland.)

around, said "They are going to shoot," and started away.

Q. Now, I will ask you if you know the defendant, Al Weathers? A. Yes, sir.

Q. I will ask you if you recognized the men on the boat at that time?

A. He was the only man I recognized; yes, sir.

Q. You recognized him? A. Yes, sir.

Q. I will ask you whether he was the man who had the gun?

A. Yes—well, he was the man who came out of the pilot-house with the gun; at the time that he came out I didn't recognize him as being Al Weathers, but he was the tall one.

Q. Now, do you know Al Weathers' voice? [64]

A. Well, yes, I do.

Q. I will ask you whether or not at that time you recognized his voice.

A. I thought I did at the time; yes, sir.

Q. Now, after Captain Knutson got scared and turned his boat did anything else transpire?

A. Well, they commenced guying us as we went away—they yelled at us, called us a few names, and that ended the incident.

Q. Now, you spoke of something in the shape of a plate or something set up on the boat—what boat was that set up on? A. On the "Diana."

Where was it set with reference to the boat you were on?

A. They were broadside her, and one particularly I remember was back of the pilot-house.

(Testimony of W. A. Borland.)

Q. Demonstrate to the jury; taking the table here as the "Diana," demonstrate how the plates were set up with reference to your boat.

A. Facing our boat, if this is the "Diana." and the "Forrester" was headed this way, and the pilot-house is here, the plate was set up here like that.

Q. Was that on the side that your boat was coming up? A. Yes, sir.

Q. You say that was a plate of some sort?

A. Yes.

Q. About what size?

A. Oh, I would say it was 2½ or 3 feet. I couldn't tell at that distance the size the plates were there.

Q. What, if anything, was it set against?

A. The gunwale of the boat.

Q. Did you see any man with reference to that plate—take any position with reference to that plate?

A. I don't remember whether I saw anyone get behind that or not.

Q. I will ask you whether you had glasses at that time? [65]

A. There was one pair of glasses on the boat, and I looked through them once.

Q. I will ask you whether you saw Weathers at that time? A. Yes, sir.

Q. Al Weathers? A. Yes, sir.

Mr. SMISER.—Take the witness.

Cross-examination.

(By Mr. HUBBARD.)

Q. Dr. Borland, you say you knew the defendant

(Testimony of W. A. Borland.)

at the time? A. Yes, sir.

Q. Where did you know him?

A. Steve Kane introduced him to me at Pete Jelich's restaurant here, and then I had seen him at different times.

Q. When was that?

A. That was a year ago last summer, the first time I saw him.

Q. That was the only time you ever saw him?

A. No, I have seen him many times.

Q. Now, can you state any other place you ever saw him except this one occasion?

A. I have seen him in Juneau several times, but I don't remember the dates.

Q. Can you state where? A. On the street.

Q. You were not acquainted with him,—did you speak to him at any time?

A. I don't remember whether I did or not.

Q. What you mean is that you saw him passing on the street?

A. Oh, I was introduced to him, yes.

Q. Can you state any other occasion except the one in the restaurant where you spoke to him?

A. Well, I have seen him on the boat and seen him at the wharf.

Q. Down at what wharf? [66] A. The float.

Q. Down at the float here? A. Yes, sir.

Q. Do you know when that was?

A. No, I couldn't tell.

Q. Couldn't tell any dates? A. No, sir.

(Testimony of W. A. Borland.)

Q. What time did you leave the cannery that morning?

A. I think it was just after dinner.

Q. It wasn't before noon—it was after dinner that you left the cannery?

A. No, I went down to the cannery about 11 o'clock, and then I had some work to do there, and I don't know what time it was, but it was afternoon, however.

Q. About what time was it when you saw this boat?

A. I couldn't say, but it was before supper. We had supper on the boat before we got to Admiralty Cove.

Q. What distance was it from the cannery to Admiralty Cove?

A. I think it was 4 hours' run or something—I don't know the distance.

Q. And you had been out, you say, how long?

A. I couldn't say, sir.

Q. What is the speed of the "Forrester"?

A. I think about 7 knots.

Q. About 7 knots with a scow?

A. Well, I don't know what her speed is—there are different size scows—I didn't pay any attention to it.

Q. Which way was the small boat from the "Forrester" when you first saw it?

A. It was headed right through the Straits, going west.

Mr. HUBBARD.—Mr. District Attorney, have you got a diagram or a chart?

Mr. SMISER.—I think it is downstairs some place.

(Testimony of W. A. Borland.)

Mr. HUBBARD.—I would like to have the location of this boat fixed [67] on the chart.

Q. (By Mr. HUBBARD.) Dr. Borland, this is a navigation chart—pilots' chart—about where were you when you saw this boat first—now, where did you start from?

A. Here is the Hoonah cannery right below here.

Q. And you started from there? A. Yes, sir.

Q. I will make a pencil-mark right here.

A. We went to Admiralty Cove,—we came from Hoonah, followed this course, about this vicinity, the boat heading for Admiralty trap.

Q. Just make a little mark on that just where you were, as near as you can, at the time you saw the small boat.

A. We were on a course—

Q. I don't care about the course—make a mark here where you were. The jury cannot tell anything about your course. At the time you saw the small boat first you were about the point where you have marked a cross?

A. Just about—just past the Sisters Island.

Q. Put another cross where the small boat was.

A. The small boat was to the north of us—on our port side. They were going in back of this channel, back of Sisters Island.

Q. Do I understand this was where you saw the small boat?

A. In around here—I don't know the distance—they were headed back in this channel, back of the Sisters Island.

(Testimony of W. A. Borland.)

Q. They were going behind the Sisters Island and you were on the other course?

A. We were on the course from Hoonah to Admiralty Island.

Q. Would this cross here approximately represent where they were?

A. That is about the relative position, as near as I can figure it out.

Q. And you were on a course, the course you put on here, representing where the "Forrester" was,—you were running on a course straight to Admiralty Cove? [68]

A. Perhaps if they took the direct course to Admiralty Cove they would be a little north of this, probably—in that position.

Q. You have fixed it here. You say right here is about where you were, there is Admiralty Cove—I say you were on a direct course for Admiralty Cove?

A. I suppose a boat traveling that distance would take a direct course.

Q. Your boat wouldn't go up to Sisters Island to get over there, would it? A. No, sir.

Q. You were running a direct course from Hoonah to Admiralty Cove? A. Yes, sir.

Q. According to the chart? A. Yes, sir.

Q. The small boat which you saw, which you testified you identified as the "Diana," was in a northerly direction? A. Yes, sir.

Q. And to the left of you? A. Yes, sir.

Q. And she was headed in behind the Sisters Island?

(Testimony of W. A. Borland.)

A. Yes; she continued her course behind Sisters Island.

Q. And she was some three or four miles away from you?

A. I couldn't say but I should judge it was $2\frac{1}{2}$ or three miles.

Q. Didn't you testify when you testified before in this case that the distance was greater than that—all of 5 or 6 miles away?

A. I couldn't say to that—it is very hard to judge distance on water.

Q. The captain of your boat then changed his course and headed for the small boat?

A. Yes, sir.

Q. Whatever it was? A. Yes, sir.

Q. Which you say was the "Diana"—and headed for the small boat? A. Yes, sir. [69]

Q. And you followed that small boat for something over an hour?

A. Yes, I think it was over an hour.

Q. The small boat still going on its regular course?

A. Yes, sir.

Q. Didn't change its course at all?

A. They seemed to tack back and forth.

Q. They seemed to? A. Yes, sir.

Q. Can you say they did?

A. Well, it appeared to me that way, and appeared to others of the crew.

Q. Is the channel there of such a nature that they have to tack in order to follow the channel?

A. I don't think so—there is plenty of water.

(Testimony of W. A. Borland.)

Q. Yes, according to the mark you put here there is 177 fathoms—they would not need to be tacking over to get water, and their course was behind the Sisters? A. Yes, sir.

Q. And the other course was in an entirely different direction—you turned around and followed this boat for an hour?

A. Yes, I should judge an hour.

Q. Then finding you weren't making any headway in overtaking it, you cut the scow loose?

A. Yes, sir.

Q. Then after you cut the scow loose your speed was better and you came up to or overtook the boat; is that it?

A. Yes, we overtook her more quickly, of course.

Q. Where was she when you overtook her?

The COURT.—He said they overtook her more quickly—gained speed on her.

Mr. HUBBARD.—I would like to have him say now where it was that they finally overtook or came up to her.

The COURT.—He did not say they overtook her,—he said they overtook her more quickly,—and you seem to assume that they [70] overtook her—that is what I wanted to call your attention to—what is in your mind and what is in his mind.

Q. Did you overtake the boat? A. No, sir.

Q. Did you come up to the boat? A. No, sir.

Q. You never overtook her? A. No, sir.

Q. But you followed it for an hour?

A. Approximately.

(Testimony of W. A. Borland.)

Q. Your boat was well armed? A. Yes, sir.

Q. You were well armed?

A. Well, we had guns aboard.

Q. Yes, all of you?

A. I don't know whether we all were or not—there were guns there, I know that.

Q. Where was it you were first able to identify the boat you were following?

A. I didn't identify it—the others identified it as being the same boat as had been over to Admiralty Cove—that is the reason they followed it. The captain seemed to want to convince me that that was the boat.

Q. You didn't identify it? A. No, sir.

Q. The identification was done by somebody else?

A. I identified it when we came closer.

Q. Where had you seen the boat prior to that time? A. I had seen it many times.

Q. Were you quite familiar with that boat at that time? A. Yes, sir.

Q. Can you state any places you had seen it?

A. Down at the float, down here. [71]

Q. You had seen it frequently when the boat was there? A. Yes, I have seen the boat.

Q. You say the captain decided to turn about when you got within what distance of the boat?

A. 150, possibly 200 or 250 yards.

Q. 250 yards from the boat?

A. Yes, about that far.

Q. He had gained the two or three miles distance in that time? A. Yes.

(Testimony of W. A. Borland.)

Q. Now, do you know the speed of the "Diana"?

A. No, I do not.

Q. Where was the boat at the time you got up with it? A. He didn't cut the scow loose—

Q. At the time you overtook this boat that was here had you passed the islands on either side of you?

A. We were in the channel between the island and the main land somewhere.

Q. That was entirely off of your course to Admiralty Cove, wasn't it? A. Yes, sir, decidedly.

Q. And you were on an armed vessel, and were chasing this small boat?

A. Yes, sir, I was on the "Forrester."

Q. And you followed it until you got within 250 or 300 yards, you think?

A. Yes, approximately that.

Q. And then the captain turned around?

A. Yes, sir.

Q. You spoke about some plates having been put up—were those plates put up forward of the pilot-house?

A. The one I recall was aft of the pilot-house.

Q. Were there any put up forward of the pilot-house?

A. It seems to me I remember one, but I wouldn't be positive.

Q. Put up against the railing there?

A. Yes, sir; aft of the pilot-house there was one against the railing. [72]

(Testimony of W. A. Borland.)

Q. Why didn't they put it up forward of the pilot-house?

A. I don't know—I don't recall that very distinct.

Q. You are an employee of the Hoonah Packing Company, aren't you?

A. I draw a salary from the Hoonah Packing Company.

Q. How long have you been in the employ of the company? A. Two years.

Q. You are still in the employ of the company?

A. Well, I don't know—no, I am not at this time.

Q. You are not in the employ of the company at this time?

A. Not at this time—there has no contract been made.

Q. Do you expect or intend to be with them this season? A. If I stay there I will be.

Q. Where were you on the "Forrester" while the chase was being made, Doctor—inside, outside, where were you?

A. I was part of the time on the forecastle, and up on the forward deck, and part of the time in the pilot-house.

Q. Where was Captain Knutson during this time? A. At the wheel.

Q. In the pilot-house at the wheel?

A. Part of the time he was there, and part of the time there may have been others at the wheel.

Q. Do you know where Captain Knutson was at

(Testimony of W. A. Borland.)

the time the plates were brought out that you testified about?

A. He was in the pilot-house and he was out on deck on the starboard side—went out of the pilot-house.

Q. Did he bring his crew out right on the deck?

A. I don't remember—I don't think so.

Q. Did they put up their plates and get ready?

A. No.

Q. Did they bring their arms up on deck and get ready? A. No, sir.

Q. What was the object of running this boat three or four miles, or for an hour, and then when you came to the crucial point,—was the captain in charge of the armed crew? [73]

A. The captain was in charge of the boat.

Q. Did he have military control as well as navigation control? A. No, sir, I don't think so.

Q. Weren't you in charge of the fighting forces?

A. No, absolutely not.

Q. Do you know how many men were aboard, Doctor?

A. There was the lifting crew and myself.

Q. The lifting crew—that is one man, isn't it?

A. Yes.

Q. How many men do they have in that lifting crew?

A. I don't know how many men there are in the lifting crew—the lifting crew and the boat crew.

Q. Where were this crew—were they all down below?

(Testimony of W. A. Borland.)

A. Some of them were, and pretty low, too.

Q. It was the same crew that fought at Admiralty Cove, evidently?

A. Yes, I think it was the same crew.

Q. Now, which side of the pilot-house did the party with the gun come out, Doctor?

A. Which side?

Q. Yes.

A. Why, I don't know—when I saw him he was facing towards the stern of the boat.

Q. He was facing the stern of their boat?

A. Yes, sir.

Q. You were then in the rear?

A. We were laying at right angles to their boat.

Q. Off at what distance?

A. From 150 to 250 yards.

Q. From 150 to 250 yards?

A. That is what I estimate it—I was scared myself.

Q. And you were looking rather across the boat, then, not facing it? A. Yes, sir.

Q. And she wasn't abeam of you? [74]

A. She was broadside of us.

Q. Could you see the stern of the boat very well?

A. Yes; I could see the bow, too. ;

Q. You could see the stern and the bow both?

A. Yes.

Q. And you saw them cover the name on the stern of the boat, did you, Doctor?

A. No, I didn't see them cover the name on the stern of the boat.

(Testimony of W. A. Borland.)

Q. Didn't you? A. No.

Q. Don't you know you saw them go and put a cloth over the name on the stern of that boat there to cover the name, on the stern? A. No, sir.

Q. You were right out so you could see if anybody could see, couldn't you?

A. I didn't see anybody cover up the name on the stern.

Q. Where was Captain Knutson at that time?

A. He was on the boat—I only saw them cover up the name on the bow.

Q. On the bow? A. Yes, sir.

Q. You were not running for the bow—you were running for the stern of the boat?

A. They were laying broadside of us.

Q. Oh, they had gotten around broadside of you now? A. Yes, sir.

Q. I thought you said a minute ago to the jury here that they were on the quarter.

A. No, I didn't say they were on the quarter.

Q. Why do you look at the District Attorney before you answer these questions?

A. I can look at the District Attorney if I want to.

Q. Do you have to look at the District Attorney before you can answer? [75]

A. No, it doesn't make any difference to me whether I look at the District Attorney or not.

Q. Do you have to look at him to see how you shall answer?

A. No, I don't care how the District Attorney

(Testimony of W. A. Borland.)

wants me to answer the questions. I am here to tell the truth, and I'll tell it, and I don't care how the District Attorney wants me to answer.

The COURT.—Very unseemly, Mr. Hubbard, very unprofessional. It is not fitting in this court, and I do not want it repeated. It is not the way to conduct a lawsuit, and I do not want this to occur again. We want to get at the truth.

Mr. HUBBARD.—I am perfectly willing to withdraw the questions if they are offensive in any way to the Court, and the answers.

The COURT.—Let us get at the truth—that is what we want.

Q. (By Mr. HUBBARD.) You had your glasses with you at the time, Doctor?

A. They were not my glasses.

The COURT.—Gentlemen of the jury, my remarks are not intended to prejudice the defendant's case in any way whatsoever. You are trying this case on evidence, and whatever I say to counsel in the case is not intended to reflect on the defendant, and you should not allow it to prejudice you in any way whatsoever. Proceed now.

Q. You say you didn't have glasses at that time?

A. I didn't have my glasses—there was a pair of glasses on the boat.

Q. Didn't you have glasses of your own with you? A. No, sir.

Q. Any glasses you used on the boat belonged to the boat?

(Testimony of W. A. Borland.)

A. Yes, sir, or belonged to somebody else—they didn't belong to me.

Q. Did not belong to you? A. No, sir.

Q. Now, tell the jury where the man came out of the pilot-house that you saw? [76]

A. He was facing the stern of the boat when I saw him.

Q. Did you see him come out of the pilot-house, Doctor?

A. I couldn't say—it was at the time he came out of the pilot-house, I suppose—he was very close to the pilot-house.

Q. You now say you suppose he came out?

A. In the position the boat lay I couldn't say whether he came out of the pilot-house, but he was facing the stern of the boat.

Q. Don't you know he was on the right-hand side of the pilot-house?

A. I couldn't tell what side of the pilot-house he came out of—he was facing the stern of the boat—he may have come out of the pilot-house on the other side.

Q. You knew the boat "Diana" quite well, didn't you, Doctor?

A. Yes, I know the "Diana"—have seen it many times.

Q. At that time you knew it was the boat "Diana"?

A. Yes, sir, the "Diana"—we agreed on that.

Q. Then the object of the pursuit of the boat wasn't for the purpose of identification?

(Testimony of W. A. Borland.)

A. That is what the captain told me, he was going to prove to me it was the "Diana."

Q. You seemed to have some doubt about it, is that it?

A. I couldn't tell at that distance.

Q. You couldn't tell the distance it was away?

A. Yes, sir; he said it was the same boat that was at Admiralty Cove.

Mr. HUBBARD.—That is all.

Redirect Examination.

(By Mr. SMISER.)

Q. Dr. Borland, you have been asked if the "Forrester" boat had arms on it at that time and I understood you to say it did have arms on it?

A. Yes, sir, at that time.

Q. I will ask you if there was any display of arms at that time?

A. There was one fellow examining a gun on the forecastle of [77] the boat when we were two miles or a mile and a half back, and he was told to put that gun away.

Q. Was that near enough to the "Diana" at that time to be seen?

A. No, it was a long ways behind the "Diana"—it was when we first started after her.

Q. After that was there any display at all of any arms? A. No, sir.

Q. Was there any attempt to use any arms on the boat at that time?

Mr. RODEN.—We object to the question as being leading and suggestive.

(Testimony of W. A. Borland.)

The COURT.—I do not know how you could bring out that fact unless you lead the witness. You may ask him what was done with those arms, if anything.

Q. Was anything done with those arms?

A. No, sir.

Q. Were any of them displayed out on the vessel? A. No.

Mr. RODEN.—We object—it has all been testified to.

The COURT.—I think he may answer that question.

Q. I will ask you if there were any words said by the way of threat to any person on the “Diana” after you approached close to it?

A. No, sir; not that I heard.

Mr. SMISER.—That is all.

(Witness excused.)

Testimony of Ivar Stenso, for the Government.

IVAR STENSO, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. SMISER.)

Q. State your name. A. Ivar Stenso. [78]

Q. Where were you employed during May, June and July of 1919? A. Why, Admiralty Island.

Q. What company were you working for?

A. Hoonah Packing Company.

(Testimony of Ivar Stenso.)

Q. What were your duties at that point?

A. Watching traps.

Q. How many traps did the company have at that point? A. Three.

Q. What were their names?

A. There was Admiralty trap No. 1, Admiralty Bay trap, and the floating-trap No. 4.

Q. Were you there on the morning of the 8th of July, 1919? A. Yes, I was.

Q. Did you live at that point during that time?

A. Yes.

Q. Where did you sleep? A. In the cabin.

Q. Where is the cabin situated?

A. On the shore, between the Bay trap and Admiralty trap.

Q. I wish you would go to the blackboard and look at a little sketch there, and I will ask you to look at that and state whether or not it fairly represents the shore line at Admiralty Bay—state whether it does or not?

A. Yes, this seems to be—there is trap No. 1, there is the cabin, there is the Bay trap, and there is the floating-trap No. 4.

Q. I see another trap to the left of the floating-trap, what is that? A. That is Hawk Inlet.

Q. I see a straight mark drawn in front of the cabin, between the cabin and the shore line; what does that straight mark represent?

A. That is some logs and rocks that they built up in front of the shack for protection from these fellows. [79]

(Testimony of Ivar Stenso.)

Q. What was it put there for, if you know?

A. For protection from shooting at the camp.

Q. Where were you about 5 o'clock in the morning of July 8, 1919? A. I was in the cabin.

Q. What were you doing?

A. I was night watching that night, and I just got home to the cabin at that time.

Q. Had you gone to bed? A. No.

Q. I will ask you if you saw any boat come in there after that time? A. Yes, I did.

Q. Point out where the boat was when you first saw it.

A. The boat came from that direction, by the Admiralty trap, you see, and was heading this way toward the floating trap.

Q. Taking a course toward the floating-trap?

A. Yes, sir.

Q. Did it proceed as far as the floating-trap?

A. What is that?

Q. Did it go as far as the floating-trap?

A. Yes, it did.

Q. What did it do, if anything, when it reached the floating-trap?

A. It slowed down and kind of stopped.

Q. How far was it from the floating-trap when it slowed down and kind of stopped?

A. A little ways—about 20 or 30 feet, I guess—something like that.

Q. Then what did it do?

A. It waited there a little while, and then it went down to the point there.

(Testimony of Ivar Stenso.)

Q. It kept on the course there and went around the point? A. Yes, went around this direction.

Q. I will ask you what, if anything, is situated around that point, if you know?

A. I didn't see that boat when it was around there, but I heard some [80] shooting.

Q. I will ask you if you know whether there is some trap around there.

A. I have seen some trap around there, but I never been around there.

Q. What company do they belong to?

A. Some of them belong to Hawk Inlet, I guess—I never been down there.

Q. You saw the boat go around that point?

A. Yes.

Q. You say you heard some shooting around there? A. Yes.

Q. Did you see that boat any more after that?

A. Yes, I saw it a little after that—they came back.

Q. How long after you saw it disappear around the point before you saw it again?

A. Oh, about half an hour, or three-quarters of an hour—something like that.

Q. Where was it when you saw it the next time?

A. Saw it when it came outside of that point there—in that direction.

Q. There is a line there marked M-N on the blackboard. How does that correspond with the course the boat was taking when you first saw it after they came around the point?

(Testimony of Ivar Stenso.)

A. Yes, that is pretty close, I guess.

Q. Which direction did it travel after leaving the point N? A. Well, it come toward the Bay trap.

Q. I will ask you if anything occurred about that time—did you notice anything—any shooting at that time?

A. Yes, when they come up outside of the Bay trap, why, I heard some shooting.

Q. Where was the shooting done from?

A. I don't know—I was in the shack at the time so I didn't notice where they were shooting from.

Q. What did you do upon hearing the shooting?

A. When I heard the shooting I went outside there and laid down [81] behind those logs.

Q. What direction did the boat take then?

A. Well, it was slowing down when I saw it—when I left the shack—slowing down.

Q. Where was it with reference to the Bay trap when you saw it slowing down?

A. It was about here, coming this way, outside the Bay trap.

Q. How long did this shooting continue?

A. About a quarter of an hour, half an hour, or something like that.

Q. Now, which way did the boat go—did it go down as far as the Bay trap—opposite the Bay trap? A. Yes, it goes down to the Bay trap.

Q. Which way did it go then?

A. Went straight out from the Bay trap.

Q. Which way—do you see a point marked A there? Does that indicate where it went?

(Testimony of Ivar Stenso.)

A. Yes, it started out that direction.

Q. Now, where was the boat "Forrester" at that time?

A. It was laying out to the dolphin here.

Q. Where was the dolphin situated there?

A. Over to the Admiralty trap.

Q. No. 1? A. Yes.

Q. Do you know whether it was tied up or not?

A. Yes, it was tied up.

Q. Did you notice a scow there?

A. Yes, it had a scow alongside.

Q. Where was the scow with reference to the boat "Forrester"?

A. They had it alongside of the boat, on the port side.

Q. On which side of the "Forrester" was this boat that was doing the shooting, at that time?

A. The port side she was laying at that time to the boat.

Q. Laying to the port of the "Forrester"?

A. The scow was outside the boat—the scow was laying outside [82] the "Forrester."

Q. Could you tell what direction the shots were going that were coming from this boat?

A. No, I cannot.

Q. I will ask you if you heard any other shots fired about that time from any other point near there?

A. No, I couldn't say—I heard shooting, but I couldn't say where they came from.

Q. You were inside the cabin or behind those

(Testimony of Ivar Stenso.)

logs? A. Yes, behind those logs.

Q. I will ask you if you recognized that boat?

A. Yes, I seen it before.

Q. What boat was it? A. The "Diana."

Q. Could you see any men on it at the time?

A. Yes, I saw men on it.

Q. How many men did you see on it?

The COURT.—Do you mean, did you see any men or could you see any men?

Mr. SMISER.—I mean did you see any men at the time?

A. Not when the shooting was going on; no, I couldn't see any men.

Q. Were you at Admiralty Cove on July 5th?

A. Yes.

Q. I will ask you whether or not there was any boat came in there on that day?

A. Yes, there was one in the morning.

Q. About what time in the morning?

A. Around 12 or one.

Q. Where were you when the boat came in?

A. I was in short, by the floating-trap.

Q. What were you doing there?

A. I was night watching.

Q. When you saw the boat come in, what direction did it come from?

A. It came from the outside shore practically, and it was outside of the trap. [83]

Q. Outside of trap No. 1?

A. No, the floating-trap.

(Testimony of Ivar Stenso.)

Q. What did you do, if anything, when you saw the boat coming in?

A. The boat came up first close to the trap, and I fired a shot for the trap foreman.

Q. Was that a signal shot?

A. Yes; he told me to fire a shot if a boat came around.

Q. Did you fire at the boat? A. No, I did not.

Q. Just fired a signal shot? A. Yes.

Q. What happened then?

A. I heard them start in shooting after while.

Q. Where did the shooting start?

A. I don't know—I didn't pay any attention. I was on the shore there.

Q. What was doing the shooting?

A. I guess they shot from the shore and from the boat—I don't know which. I couldn't say.

Q. You couldn't say which started first?

A. No.

Q. Was there any shooting done from this boat?

A. Yes, I guess there was.

Q. Did you hear any of the shots, where they were hitting? A. No.

Q. Where did you go when this shooting began?

A. I was sitting right there.

Q. Right where?

A. On the shore, where the lead of the floating-trap goes to shore.

Q. Could you see which way the boat was traveling?

A. It was laying at the trap for a while, while

(Testimony of Ivar Stenso.)

the shotting was going on, and as soon as it was over they went straight out.

Q. You say that was about what time in the morning? A. Around one o'clock. [84]

Q. Around one o'clock on July 5th? A. Yes.

Q. I will ask you whether this boat robbed the trap at that time? A. Yes, they robbed the fish.

Mr HUBBARD.—I object to that. Let him state what the boat did.

Mr. SMISER.—I asked him if trap No. 4 was robbed at that time, where he said this boat was at that time.

The COURT.—That would not be admissible unless you can connect the "Diana" with it.

Mr. SMISER.—I think we can do that, your Honor.

The COURT.—Very well, on your promise to connect the "Diana" with it, it will be admitted.

Mr. HUBBARD.—We will object to the testimony until he does do it, your Honor.

The COURT.—It will be stricken if it is not connected. When I say the "Diana," of course I mean the defendant or the boat.

Q. About how many fish were in the trap at that time, if you know? A. No, I don't know.

Q. You don't know? A. No.

Q. Did you watch that particular trap?

A. No, I watched the Bay trap.

Q. Now, I will ask you whether you were at Admiralty Cove, at this same point, on June 29th?

A. Yes.

(Testimony of Ivar Stenso.)

Q. I will ask you whether on that occasion—at that time—any of your traps were robbed?

A. Yes, floating-trap No. 4 was robbed.

Q. What time did that occur?

A. Around 6 o'clock in the morning.

Q. Where were you at that time?

A. I was in the cabin.

Q. Had you gotten up for the morning, or had you been to bed?

A. No, I had been watching. [85]

Q. You had been watching and hadn't been to bed? A. No.

Q. Did you see the boat at that time?

A. Yes, I did.

Q. Did you recognize it?

A. Yes—it seemed to be the same boat.

Q. What boat was it? A. The "Diana."

Q. Do you know how many fish it took at that time? A. About a thousand fish.

Mr. HUBBARD.—Now, if the Court please, I think we will object to this testimony—that is, going into the question of the number of fish taken with reference to the 29th of June—that isn't in this case.

The COURT.—Of course the number of fish taken is not material.

Mr. HUBBARD.—It is only a question of the identification of the defendant or the boat on the 29th—it isn't a question of whether or not the fish were taken, or how many. That is another and different charge.

(Testimony of Ivar Stenso.)

The COURT.—If the testimony is admissible it would be admissible if only one fish were taken. The quantity of fish taken does not make any difference,—if it is connected it is admissible.

Mr. HUBBARD.—I save an exception to the testimony.

Q. Was there any shooting done at that time?

A. No, sir.

Q. By the boat or by anyone on shore?

A. No.

Q. I will ask you whether you were at Admiralty Cove about the middle of June—somewhere around the 17th of June? A. Yes, I was there.

Q. I will ask you whether or not any trap was robbed on that occasion? A. Yes, there was.

Q. What trap?

A. The Bay trap and the floating-trap No. 4.
[86]

Q. Do you know whether they had fish in them at the time? A. Yes; they had a few.

Q. Do you know how many?

A. About 200, I think, in the Bay trap.

Mr. HUBBARD.—If the Court please, we desire to save an exception to this testimony with reference to the 17th, that he is testifying to.

The COURT.—The testimony is admitted, Mr. Smiser, on your promise to connect it—if it is not connected, it will be stricken.

Mr. SMISER.—I think we will do that satisfactorily, your Honor.

The COURT.—Very well, it will be admitted,

(Testimony of Ivar Stenso.)

subject to a motion to strike later on if counsel thinks it is not connected—he may make the motion to strike it out then.

Q. About how many fish were in No. 4 at that time? A. I don't know.

Q. What boat—did you recognize the boat?

A. Yes, it seemed to be the same boat.

Q. What boat was that? A. The “Diana.”

Q. Where were you at the time the boat came up there? A. I was at the cabin.

Q. What time of the day or night was this?

A. It was about 11 o'clock in the evening.

Q. I will ask you if you were there on June 10th? A. Yes, I was.

Q. I will ask you whether any trap was robbed on that occasion? A. Yes; No. 1 was robbed.

Q. What time did that occur?

A. I don't know—it was in the night sometime.

Mr. HUBBARD.—We reserve our exceptions to this testimony, the same as the others, if the Court please—do not think it is material or competent in this case.

The COURT.—The ruling will be the same.

Q. Did you see that boat on that occasion? [87]

A. No.

Q. All you know about that particular instance is that the trap was robbed on that particular date?

A. Yes.

Mr. HUBBARD.—Now, if the Court please, we will move to strike out his testimony,—he said he didn't see the boat.

(Testimony of Ivar Stenso.)

The COURT.—The District Attorney does not have to connect it with this witness. When the Government's testimony is closed if it is not connected, then is the time to make your motion to strike it out. He does not have to connect it by this one witness—he may have some other witness to connect it by—I cannot tell.

Mr. HUBBARD.—We will keep our exception until later.

Q. Now, on June 17th, after they had robbed the trap, the boat "Diana" had robbed the trap,—

Mr. HUBBARD.—I object to that.

The COURT.—Overruled.

Q. Now, on that occasion I will ask you whether the boat as it was leaving gave any signal or anything of that sort, or made any noise?

A. Not as I heard—I was in bed.

Q. I am talking about the 17th, when you say you recognized the "Diana."

A. Yes—I didn't hear her when she left, no—I saw the boat when it came.

Q. You saw it when it came, but you didn't see it when it left—is that what I understand you to say?

A. Yes; I saw it when it came in there first.

Q. On July 8th, the time this shooting occurred, did you see the boat? A. Yes, I saw it.

Q. Did you recognize that boat? A. Yes.

Q. What boat was it? A. The "Diana."

Mr. SMISER.—Take the witness.

(Whereupon court adjourned until 2 P. M.) [88]

(Testimony of Ivar Stenso.)

AFTERNOON SESSION.

February 11, 1920, 2 P. M.

IVAR STENSO on the witness-stand.

Cross-examination.

(By Mr. RODEN.)

Q. Now, Ivar, I believe you stated this morning you were awake on the morning of the 8th, about 5 o'clock of the 8th, when you heard some shots fired—that you were in the cabin, is that correct? A. Yes.

Q. I suppose you stood at the window to see where the shots came from, did you?

A. I went outside the cabin and laid down behind the logs.

Q. You did that right away, did you?

A. Yes, as soon as I heard the shooting.

Q. Of course, you saw the boat then that was doing the firing? A. Yes, I saw the boat.

Q. Where did you say the boat was?

A. Outside the Bay trap.

Q. Which way was she heading then?

A. She was still then.

Q. She was standing still?

A. When I saw her; yes.

Q. Which direction was her bow turned?

A. Her bow was headed out.

Q. Heading out towards the Straits, or up?

A. Towards the Straits.

Q. That was the first you heard about the shooting? A. I heard it around Hawk Inlet.

(Testimony of Ivar Stenso.)

Q. What had you been doing that night?

A. I had been night watching.

Q. And you came back from your trap and went to the house? A. Yes.

Q. You hadn't gone to bed yet? [89]

A. No.

Q. All right. Now, the shotting—the first shooting that you heard distinctly took you out of the house and you went behind those logs, as you say, and then you say the boat laying out from the Bay trap—prior to this you had heard some shooting but where that shooting was you don't know?

A. No, sir.

Q. You didn't see any shots fired from the boat, did you? A. No, I did not.

Q. No, and you cannot swear now where those shots came from?

A. I don't know where they came from.

Q. When you saw the boat opposite the Bay trap she was heading out? A. Yes.

Q. About how many shots would you say were fired after you saw the boat in that position and as she was heading out?

A. Around between 20 and 30, I guess—something like that.

Q. Were there any fired from anywhere else except the boat? A. I don't know.

Q. You don't know? A. Not from the cabin.

Q. You were close to the cabin all this time?

A. Yes, sir.

Q. Now, we will go a little prior to the 8th. I

(Testimony of Ivar Stenso.)

think you testified that you saw the boat on the morning of the 5th, too, did you?

A. I saw a boat; yes.

Q. Can you swear that was the same boat?

A. No, sir; I cannot.

Q. Can you swear positively, Ivar, that you saw this same boat which you saw on the morning of the 8th at any other time,—can you swear positively to that? A. Yes.

Q. You can—all right, when was it that you are absolutely sure that you saw the same boat? [90]

A. The 29th.

Q. At what time of the day was that?

A. It was in the morning.

Q. About what time?

A. Around 6 o'clock in the morning.

Q. You had come off watch, had you?

A. No, I wasn't watching then.

Q. How did you happen to see the boat then?

A. I just got up.

Q. You got up and you saw the boat out there?

A. Yes.

Q. At which trap? A. No. 4.

Q. At trap No. 4—that is the floating-trap.

A. Floating-trap No. 4.

Q. You saw her from the cabin?

A. Yes, sir; I did.

Q. About what is the distance between the floating-trap and the cabin?

A. Around 4,000 feet, I think.

Q. About 4,000 feet? A. Yes.

(Testimony of Ivar Stenso.)

Q. Couldn't be mistaken about that, could you?

A. No.

Q. Were there any fish taken out of that trap then? A. Yes, sir, there was.

Q. Was there any shooting done at that time?

A. No.

Q. They simply took the fish and there was no shooting? A. Yes.

Q. Are those the only two occasions to which you can positively swear as far as knowing the boat or recognizing the boat is concerned? [91]

A. I saw her around the middle of June—around the 17th.

Q. You saw her again around the 17th?

A. Yes.

Q. The same boat?

A. A boat about the same length.

Q. Looked like it? A. Yes.

Q. About the same length?

A. Looked like the same boat; yes, sir.

Q. In what particular did this boat differ from other fish boats?

A. The rigging was a little different.

Q. What was the arrangement that was different from others?

A. The mast and the boom were the same height.

Q. You mean they were the same length?

A. Well, it was even on top, I mean.

Q. They were even on top? A. Yes.

Q. The mast and boom—was the boom close up to the mast—lashed to the mast?

(Testimony of Ivar Stenso.)

A. No, not close up.

Q. I do not understand what you mean by saying they were the same.

A. The boom was even with the top of the mast when it was up.

Q. The boom was even? A. Yes.

Q. Then the boom must have been pretty well drawn up to the mast, is that it? A. Yes.

Q. I will let this be the mast—this would be the boom? A. Yes, sir.

Q. The boom was pretty well up along the mast to be even on top? A. Yes.

Q. And that was the same on every occasion?

A. Yes.

Q. Haven't you ever seen the same condition on any other boat? [92]

A. No, not like it was on that.

Q. You have never seen the same on any other boat?

A. No, not the same as it was on that boat.

Q. What other differences did you notice between that boat and any other ordinary fishing boat?

A. Gray painted, black hull.

Q. I didn't quite catch you.

A. The boat was black hull, and it was gray.

Q. What other difference did you see between that boat and other boats?

A. It had a skiff on the stern.

Q. Is that the only boat you have ever seen with a skiff on the stern? A. Yes.

Q. Now, last week when you testified here you

(Testimony of Ivar Stenso.)

didn't remember anything about the condition of that boat in the way of being different from other boats, did you? A. Yes, it was the same.

Q. The only difference you could tell last week was that there were two doors to the pilot-house—did you say that last week?

A. There were two doors to the pilot-house; yes.

Q. There were two doors to the pilot-house, and that was the only difference you could find between the "Diana" and any other fishing boat—didn't you testify to that?

A. There was a window in the pilot-house; yes.

Q. How many doors were there to this pilot-house—two doors?

A. About six, I think it was.

Q. Six doors? A. Windows.

Q. Windows—I am talking about doors.

A. There was one on each side.

Q. You are positive about that, are you?

A. I am not quite sure.

Q. You are not quite sure—then why did you say there was one on each side if you don't know—you don't know how many [93] doors there were in the pilot-house, do you?

A. I never been on the inside of it—been close to it.

Q. Do you know how many doors are in the pilot-house? A. No, I don't.

Q. Now, you say you saw them on the 10th of June and on the 17th of June, is that correct?

A. Yes, I saw the boat the 17th of June.

(Testimony of Ivar Stenso.)

Q. How do you know it was the 10th of June?

A. I didn't say I saw it on the 10th—the 17th.

Q. You didn't see it on the 10th?

A. No, sir, I didn't.

Q. You saw it on the 17th—how do you know it was the 17th of June?

A. It was around the 17th.

Q. It was around the 17th? A. Yes.

Q. Might have been some other days—and you saw her on July 5th, too, didn't you?

A. I saw a boat; yes, sir.

Q. You saw a boat? A. Yes.

Q. You didn't know what boat that was?

A. No, sir.

Q. How do you know it was July 5th when you saw the boat?

A. Yes, I know that was the date.

Q. Did you make a note of it anywhere?

A. Yes, I know it was the 5th.

Q. And you saw a boat on the 29th of June?

A. Yes.

Q. How do you know it was the 29th?

A. I paid attention to it.

Q. Paid attention to it? A. Yes.

Q. But you don't know whether you saw her on the 17th or not? [94]

A. No, it was around the 17th.

Q. And the 17th is the time—or around the 17th—when the two traps were robbed, the Bay trap and the floater? A. Yes, sir.

Q. What time of day was that?

(Testimony of Ivar Stenso.)

A. It was in the evening, about 11 o'clock.

Q. You were in bed, weren't you?

A. No, I wasn't in bed.

Q. Where were you?

A. I was in the cabin.

Q. And you saw this boat come out there and rob the two traps? A. Yes, sir.

Q. And that was about the 17th?

A. Around the 17th; yes, sir.

Q. But you don't know what boat that was?

A. That was the same boat that was there after that.

Q. Now, you never knew—when did you first learn that the name of this boat that you saw at that time there was the "Diana"? A. What?

Q. When did you first learn the name of the boat? A. In Juneau.

Q. In Juneau—that was the first time—that is when you saw the boat here in town? A. Yes.

Q. You never knew before that it was the "Diana"?

A. Never was close enough to see the name of it.

Q. You never had heard anybody mention the "Diana" in connection with these robberies?

A. No.

Q. Anybody talk about the "Diana" on the 8th?

A. I don't remember.

Q. Or on the 5th? A. I don't remember. [95]

Q. Or at any other time?

(Testimony of Ivar Stenso.)

A. No, I don't remember.

Mr. RODEN.—That is all.

(Witness excused.)

Testimony of Swan Swanson, for the Government.

SWAN SWANSON, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. SMISER.)

Q. State your name. A. Swan Swanson.

Q. Where were you employed during June and July of 1919?

A. I was employed by the Hoonah Packing Company.

Q. Where were you stationed?

A. Over in Admiralty Island.

Q. When did you go there?

A. 26th of June.

Q. Were you there on the 8th of July, 1919?

A. Yes, sir.

Q. In the morning, now, I will ask you if you saw any boat come in there—in the morning?

A. Yes, sir.

Q. Where were you when you saw it?

A. I was in the cabin.

Q. Had you been to bed that night?

A. The night before—yes, I went to bed.

The COURT.—Which night?

A. The night before June 8th.

(Testimony of Swan Swanson.)

Q. You went to bed the night of July 7th?

A. Yes, sir.

Q. And you were in the cabin the next morning about 5 o'clock? [96]

A. Yes, sir.

Q. What called your attention, if anything, to the presence of the boat?

A. I heard some of the boys upon the shore talking about the boat coming around?

Q. What did you do, if anything?

A. I turned around and went over to the door and looked out, and I seen a boat there between Bay trap and No. 1.

Q. Was it moving or standing still?

A. It was moving from No. 1 towards the direction of Hawk Inlet.

Q. How far did you say it had gotten when you saw it?

A. I think it was about 1,500 or 2,000 feet from the No. 1 or "Forrester."

Q. Where was it with reference to the Bay trap?

A. It wasn't quite over to the Bay trap when I seen it.

Q. Which way did it proceed?

A. It proceeded toward Hawk Inlet.

Q. In going that direction did it go near any of the traps?

A. Yes, sir; it was also heading towards floating trap No. 4.

Q. What did it do, if anything, at No. 4?

A. They turned around, slowed down, and then

(Testimony of Swan Swanson.)

they came into No. 4 trap, and turned out and proceeded on.

Q. When you say turned around, do you mean the boat turned all the way around?

A. Yes, they took a circle and came up to the floating-trap, like it was looking into the trap or something, and turned in the same direction they were heading for before they came into the trap.

Q. Take the pointer and indicate on the black-board the direction it went and where it would be when you saw it, and about the course it took.

A. It was about here when I seen it.

Q. Show the course it took from here.

A. Took about,—come over here, then swung into this floating-trap, [97] and proceeded over here.

Q. Now, did it stop at this floating-trap when it swung in there?

A. I am not quite sure they stopped, but I know they slowed down—kind of went slowly.

Q. Then it went around to the Hawk Inlet trap?

A. Yes, sir.

Q. Is there a trap of the Hawk Inlet Company around that point?

A. There is one there, and one around this point here.

Q. Now, is that point there a named point—has it got any name to it?

A. Not that I know of.

Q. Where is Hawk Inlet with regard to that point?

A. Hawk Inlet is over there pretty near the same

(Testimony of Swan Swanson.)

direction—straight across and adjoining here somewhere.

Q. How far away?

A. I think it must be 6 or 7 miles from here, I guess.

Q. How far is this point where you say the Hawk Inlet trap is situated—how far is that from the camp down here? A. I don't know.

Q. Well, give us an estimate.

A. Must be 9,000 or more.

Q. 9,000 what? A. Feet.

Q. But Hawk Inlet itself is six or seven miles away; is that true? A. I think so.

Q. Now, after you saw the boat pass around that point where you say the Hawk Inlet trap is, did you hear anything?

A. Yes, I heard there was some shooting.

Q. Heard some shooting? A. Yes, sir.

Q. Now, did you see the boat any more after you heard that shooting?

A. Yes, sir; a few minutes after it came around here.

Q. I see a mark on the board there of a line called M-N; what does that represent? [98]

A. That is where they started firing.

Q. What does it represent with regard to where the boat was?

A. The boat was about here when it started firing, after they came around the point.

Q. Well, what direction was the boat going?

A. It was going in towards this boat here.

(Testimony of Swan Swanson.)

Q. Does that line M-N represent the direction?

A. Yes, sir, pretty fairly.

Q. Now, from N on which way did it go?

A. Kept on going this way here.

Q. Now, does it pass the floating-trap No. 4 on that course? A. Yes, sir.

Q. How near did it come to the trap at that time?

A. Why, I think it must be about a thousand feet or so.

Q. Outside of the trap? A. Yes, sir.

Q. Then which way did it go after passing floater No. 4?

A. It kept on on the same course, in this direction here.

Q. Where was the "Forrester" boat at that time?

A. The "Forrester" was laying tied up at that time at this dolphin here, where that cross is.

Q. Now, with respect to the course that the boat was on coming from M towards the Bay trap, was that in the direction of the "Forrester"?

A. Yes, sir.

Q. Now, coming in that direction what was the boat doing, if anything?

A. It was shooting—firing guns.

Q. Could you tell where the shots were landing? A. No, sir.

Q. Where were you at that time?

A. At that time when the boat was here I was up to this point here.

Q. That point is near what place?

(Testimony of Swan Swanson.)

A. Near floating-trap No. 4. [99]

Q. When had you gone there?

A. When the boat headed—when I seen the boat I took my gun and two boxes of ammunition and went down the beach there, and I called, also, Henry Alexander—he was sleeping in a tent here, about 200 yards or so away from the cabin—then I proceeded down the beach here.

Q. What is the character of the surface at that point where you say you stopped—is it smooth level surface, or is it otherwise?

A. Here is a gravel beach here.

Q. Out from where you stopped?

A. That is kind of rocks—kind of rocky formation with ragged rocks.

Q. How did you place yourself with regard to those rocks and the boat?

A. I placed myself here, down at the low water.

Q. Where did Henry Alexander go?

A. He proceeded further toward the floating-trap.

Q. Could you see him when he left you?

A. After he left me I didn't see him.

Q. What prevented you from seeing him?

A. The rocks.

Q. Did the rocks stick up? A. Yes, sir.

Q. Now, when the boat passed the floating-trap I will ask you whether it was firing at that time.

A. Yes, sir.

Q. Now, did you and Henry Alexander do anything? A. Yes, I opened fire at them here.

(Testimony of Swan Swanson.)

Q. You opened fire?

A. From this place here; yes, sir.

Q. How many shots did you fire?

A. Oh, about 12 or 13. I am not sure of it.

Q. What were you shooting at?

A. Was shooting at the boat. [100]

Q. Did Henry Alexander fire some shots?

A. I couldn't tell—I heard some shooting to the left of me.

Q. You heard some shooting to the left of you?

A. Yes; it took about the same length of time.

Q. What did this boat do when you opened fire?

A. He kept on going in the same direction and I kept on shooting.

Q. He kept going in the same direction—was that the direction of the “Forrester”?

A. Yes; came in this direction here, and when he came in about here he swung over across—

Q. Came to about the point marked A?

A. Just about.

Q. Then what did it do?

A. They turned right across Chatham Straits.

Q. Now, can you tell how far it was from the “Forrester” to the boat that was doing the shooting at the time it was nearest to it?

A. Must be about 1,500 or 2,000, or more.

Q. 2,000 what? A. Feet.

Q. Did you recognize that boat?

A. I recognized the boat later on tied to the wharf here in Juneau.

Q. When you came into Juneau you recognized

(Testimony of Swan Swanson.)

that boat? A. Yes, sir.

Q. What boat was it?

A. It was the "Diana."

Q. How did you happen to see it at the float at Juneau when you came in?

A. It was laying down here at the dock and I knew it was her.

Q. Did anybody point it out to you?

A. Yes, I believe the game warden fellow was down there—I don't know his name—officer.

Q. Well, did you recognize it yourself or did he tell you it was—

A. I recognized it as soon as I seen the boat.

Q. As soon as you saw the boat?

A. Yes, sir. [101]

Q. Without him telling you?

A. I don't think I spoke to him while we was down there because there was quite a few boys there, and I don't think I talked to him down there.

Q. I will ask you if you ever saw that same boat at Admiralty Cove at any other time?

A. I seen that same boat the 29th of June.

Q. Where was it then?

A. When I first seen it it was tied up to the floating-trap.

Q. No. 4 there? A. Yes, sir.

Q. What time was that, day or night?

A. It was 7 o'clock in the morning—about 7 o'clock.

Q. What was it doing there?

(Testimony of Swan Swanson.)

A. It was brailing the fish out of the trap—taking the fish out of the floating-trap.

Q. Did you see any men on board?

A. Yes, sir, I seen one man on board and two on the trap.

Q. Where were you at that time?

A. I was in the cabin door.

Q. Was there any shooting done on that occasion? A. No, sir.

Q. That was on June 29th? A. June 29th.

Q. I will ask you if you were there July 5th.

A. Yes, sir.

Q. Did anything happen there at the camp on that occasion?

A. Yes; between 12 and 2 o'clock in the morning two boats come—lights of two boats.

Q. Where were they when you noticed them?

A. They were coming in from this direction out here and heading in towards the beach here.

Q. Describe what—

A. I recognized it—the boat that was ahead was the patrol-boat— [102] Henry Alexander with the boat.

Q. One of those boats you saw was the patrol-boat with Henry Alexander? A. Yes, sir.

Q. Well?

A. Then there was a boat right behind him, and Alexander tied up his boat to a pile here—there is a pile here, or a dolphin that we use to tie up the small skiffs that we use to tend to the traps with—he tied up his boat to that, and I took a skiff and

(Testimony of Swan Swanson.)

pulled out to him, and we both went over here to the rocks here—a reef about here.

Q. See where there is a mark down there?

A. Yes, sir.

Q. Is that at the right place?

A. No, I think that should be a little closer here to this trap.

Q. Where the word “trap” is written?

A. Yes, sir.

Q. The Bay trap? A. Yes, sir.

Q. You went around there to a reef?

A. Yes, sir.

Q. What did the boat that you speak of do?

A. Well, when he chased the boat in there to that pile he turned around and went over to the floating-trap.

Q. This boat that you saw behind Alexander?

A. Yes, sir.

Q. What did it do further, if anything?

A. Well, it was lifting the trap, I guess.

Q. Well, do you know?

A. I know the fish was gone next morning.

Q. How long did it remain at the trap?

A. Well, they might have remained about—probably three-quarters of an hour more or less.

Q. Do you know whether there was any fish in that trap or not before the boat went there? [103]

A. There was—I didn’t see it but it was reported to me the night before.

Mr. HUBBARD.—We object to that.

Q. Never mind what was reported to you. You

(Testimony of Swan Swanson.)

say there was no fish in it the next morning?

A. No, sir.

Q. What did Henry Alexander do when you got around up there to those rocks?

A. I was shooting at that boat.

Q. What did the boat do?

A. They shot out the trap light—turned off the light of the boat and started to fire.

Q. Which way did she travel when she started to fire?

A. When they started to fire they were laying at the trap.

Q. Well, when she started then?

A. When she started she was getting closer this way towards the camp.

Q. Well, outline the course as well as you can there.

A. Must have been coming up this way here, I believe.

Q. What was she doing during that time?

A. She was keeping on shooting.

Q. Where was she shooting at?

A. I didn't know at the time, but later when I came up to the cabin all the men were up in the woods—they had been shooting at the cabin.

Q. Now, did you recognize that boat at that time?

A. No, sir, it was night and I couldn't see the name on it.

The COURT.—What time was that?

Mr. SMISER.—That was July 5th.

(Testimony of Swan Swanson.)

Q. Now, on June 29th were you at the camp,—the 29th of June? A. Yes, sir.

Q. Did anything happen there that night?

A. Yes, there was a boat, when they called me in the morning, at the floating-trap. [104]

Q. About what time?

A. About 7 o'clock in the morning.

Q. I believe you stated that you recognized that boat at that time, did you?

A. No, I recognized the boat later on, down here in Juneau.

Q. What boat was it?

A. It was the "Diana."

Q. Were you there around about the 17th of June? A. No, sir.

Q. You hadn't gotten there yet? A. No.

Q. I notice a mark there between the cabin and the shore on that drawing; what is that mark?

A. That is the fortification that was put there after the cabin was shot, for to protect the cabin and those men that was in there.

Q. Put up there to protect them from the shots?

A. Yes, sir.

Q. After what date?

A. After the 5th of July.

Q. Was it there on the 8th? A. Yes, sir.

Q. And between those dates this barricade had been built up there of rocks and logs?

A. Yes, sir.

Q. Were there any men sleeping in this cabin or in the cabin that night of July 5th?

(Testimony of Swan Swanson.)

A. Yes, there was some of the boys in there.

Q. Now, when you say that was on July 5th, what time in the night was it?

A. It was between 12 and 2 o'clock on the morning of the 5th, I guess.

Q. On the morning of the 5th?

A. Yes, sir. [105]

Q. Between 12 and 2 o'clock at night?

A. Yes, sir.

Q. On either one of these occasions you testified to seeing the boat there did you see any men on board her? A. Yes.

Q. On which occasion?

A. On the 8th of July.

Q. How many men did you see?

A. When they came back here I seen one man on the deck.

Q. Could you give a description of that man?

A. It was a tall man.

Q. How did his size compare with the defendant, Al Weathers? A. Just about his size.

Q. Did you know Al Weathers at that time?

A. No, sir.

Q. Did you hear anything said on July 5th when they were there?

A. Yes, when they were at the trap, when the night watchmen fired two shots, they hollered ashore and called them down—called them sons-of-bitches, and told them to stop shooting.

Q. Where were these watchmen stationed that were firing the shots?

(Testimony of Swan Swanson.)

A. One was on this point here and one was over on this point here.

Q. How many shots did they fire?

A. I don't think they fired more than a shot apiece.

Q. What was that for, if you know?

A. It was a signal shot.

Q. To signal what?

A. To signal me over there.

Q. To signal to you? A. Yes, sir.

Q. That you would know what happened?

A. Yes, sir.

Q. What did it give you a signal of—what did you know when you heard the signal?

A. I heard the signal and I knew fish pirates was close to the [106] trap there.

Q. Did you have an agreement to that effect?

A. Yes, sir.

Q. Then when you heard that what did you do?

A. Well, we were on the road then.

Q. You and Alexander were on the road where?

A. On the road over towards the floating-trap, and we pulled into this reef.

Q. You said, I believe, that when these signal shots were fired that they hollered—just repeat what it was that they hollered.

A. They hollered ashore and told them to stop shooting, and called them sons-of-bitches.

Mr. SMISER.—Take the witness.

(Testimony of Swan Swanson.)

Cross-examination.

(By Mr. HUBBARD.)

Q. When the shooting first started, Swan, it was more than a mile away from the "Forrester"?

Mr. SMISER.—I do not think the question is intelligible—I think he ought to define the time of which he speaks.

The COURT.—On which occasion ?

Mr. HUBBARD.—That would be the occasion of the 8th, the one we are trying here.

Q. (By Mr. HUBBARD.) You have indicated on the board there where the boat was when it started—or when the firing started, and I ask you if that was a mile or more away from the "Forrester" at that time.

A. I don't know how far it was.

Q. Well, am I right in understanding that this mark represents the point where the firing commenced? A. Yes, just about there.

Mr. HUBBARD.—As I understood the witness when he testified originally on his direct examination, he said when the boat came back from calling at Hawk Inlet the firing commenced about that [107] point, and I simply wanted to get the distance that was from the "Forrester," when the firing commenced.

Q. (By Mr. HUBBARD.) When the firing commenced at this point, how far would it be from the "Forrester," Swan?

A. This—it would be around a mile—probably more.

(Testimony of Swan Swanson.)

Q. It would be a mile at least from the "Forrester" when that firing first occurred that you heard. Now, you heard that shooting, did you?

A. Yes, sir.

Q. And at that time you had taken your position on the rocks down below? A. Yes, sir.

Q. You were in the position you went to—you had got there?

A. No, I don't think we got down there.

Q. You don't think you had reached the point yet? A. No, I don't think so.

Q. You were on your way down from the cabin to the rocks where you were to conceal yourself, or where you got behind? A. Yes, sir.

Q. You did get behind the rocks, did you, at the time? A. Yes, sir.

Q. Alexander goes on to another point?

A. Yes, sir.

Q. You couldn't see him after he left you and went on to his position, could you? A. No.

Q. But either while you were on your way down, or after you got there, you heard the firing?

A. Yes, sir.

Q. And at that time the boat was something like a mile away?

A. From the "Forrester," it would be.

Q. Yes, from the "Forrester"—that is what I am getting at. Now, after you got into your position there you commenced firing at the boat?
[108]

A. No, sir.

(Testimony of Swan Swanson.)

Q. You didn't? You didn't commence shooting at the boat?

A. I commenced after the boat come abreast of the floating-trap.

Q. When it got abreast of the floating-trap, that is when you commenced shooting?

A. Yes, sir.

Q. How far was she off the floating-trap at the time?

A. She was about a thousand feet off the floating-trap, I think.

Q. What is the length of the lead of the floater?

A. From that point it must be, I think, about a thousand feet.

Q. Isn't the lead of the floating-trap more than a thousand feet?

A. Yes, sir, she was more, but from the point where I was—

Q. I am asking you now—you said a thousand feet off the floating-trap, and you say you were about a thousand feet from the trap?

A. From the real trap—from the head.

Q. Yes, that is right—you mean the trap itself, not the lead? A. Yes, sir.

Q. You were a thousand feet from that, inside of the trap? A. Yes, sir.

Q. On the shore? A. Yes, sir.

Q. The boat you were firing at was a thousand feet outside, and you say you took two boxes of ammunition with you down there? A. Yes, sir.

Q. Did you use it all up? A. No, sir.

(Testimony of Swan Swanson.)

Q. How many shots did you say you fired?

A. Oh, about 12 or 13.

Q. At this small boat—you fired 12 or 13 shots when she was a thousand feet off the floating-trap?

A. Yes, sir.

Q. Out to sea? [109] A. Yes, sir.

Q. Why did you do that?

A. I was protecting the camp—those fish pirates were firing at the camp.

Q. You thought you were protecting the camp by firing at that boat that was a thousand feet out to sea? A. Yes, sir.

Q. 2,000 feet out to sea, but a thousand feet to the nearest trap, wasn't it? A. Just about that.

Q. And you went firing at that boat at that distance there? A. Yes, sir.

Q. And you say they were not firing at you as far as you know?

A. No, but they were firing at the camp.

Q. You thought they were firing at the camp and not at the "Forrester"? A. Yes, sir.

Q. You thought they were firing at the camp building? A. Yes, sir.

Q. As a matter of fact, they were not firing at the camp building, were they?

A. I don't know.

Q. You did know about it after it was all over, didn't you—you knew they were firing at the "Forrester"—the camp wasn't fired on on July 8th, was it? A. No, not on the 8th.

Q. So you were mistaken when you thought they

(Testimony of Swan Swanson.)

were firing at the camp, and therefore thought you would shoot back at them? A. Yes, sir.

Q. Did you see the barge and the "Forrester" that morning? A. Yes, sir.

Q. How far is the dolphin from the Admiralty trap No. 1 lead, to which the "Forrester" was tied—how many feet about? [110]

A. Probably between 700 and 1,000 feet.

Q. You mean it is 700 or a thousand feet from the lead of Admiralty trap No. 1 out to the dolphin where the boat was tied?

A. Yes, it must be about that—somewhere around there.

Q. That would make the,—what is the distance between the Admiralty trap No. 1 and the Bay trap?

A. That was somewhere around 2,400 feet, I believe.

Q. 2,400 feet? A. Or more.

Q. How much more, if it is more than that, Swan—you have been there and you know the distance pretty well, don't you? A. No, I don't

Q. You never measured it? A. No, sir.

Q. You estimate it— A. Yes, sir.

Q. As 2,400 or 2,500 feet? A. Yes.

Q. The distance was 2,400 or 2,500 feet along the shore or between the traps?

A. Between the traps, I believe.

Q. That would be straight across? A. Yes.

Q. What is the distance between the Bay trap and the floater, straight across?

(Testimony of Swan Swanson.)

A. That would be between 1,900 and 2,000 feet.

Q. You think—2,400 feet and 2,000 feet would make 4,400 feet—this boat was approximately 4,400 feet, then, according to your testimony, from the “Forrester” at the time you were shooting at her?

A. Somewhere around there.

Q. It was 4,000 feet from the “Forrester” when you commenced shooting?

A. Somewhere around there. [111]

Q. You can look at the diagram, and from your statement of distances that you put on, you say it is a thousand feet from the Admiralty trap No. 1 to the dolphin, and 2,400 feet from the Admiralty trap No. 1 to the Bay trap, and 2,000 feet between the Bay trap and the floater, so putting it at 3,000 feet is very conservative—according to your estimate the distance would be a mile or more.

Mr. SMISER.—I object to that statement—no such conclusion could be drawn from his testimony. I think counsel ought to be confined to asking questions and not to arguing the proposition.

Mr. HUBBARD.—I was asking the direct question as to the distance between the small boat and the “Forrester” at the time he commenced shooting at the boat himself.

Mr. SMISER.—I have no objection to that question.

The COURT.—I do not think that is argument. What is your best judgment as to how far it was—your best judgment.

A. I think it was around 4,000 feet, heading

(Testimony of Swan Swanson.)

towards the "Forrester" at the time.

Q. What is the length of the "Forrester"?

A. The length of the "Forrester" is—I couldn't tell—I think she is around about 70 feet—something like that.

Q. On the diagram here it indicates that the "Forrester," when she is swinging at the dolphin, swings back very close to the Bay trap—when tied to the dolphin how far would she be away from the Bay trap?

A. Probably some 1,800 feet, or something,—

Q. Maybe you do not understand me. You said it was 2,400 feet across from the one trap to the other, and I understood you to say that the dolphin was out about 800 feet from the lead of Admiralty trap No. 1? A. Yes.

Q. Now, if it was 800 feet out from the lead of Admiralty trap No. 1 to the dolphin where it was tied, you would have to [112] take that 800 feet, wouldn't you, from the 2,400 feet—that would leave you 1,600 feet?

Mr. SMISER.—He said 1,800 feet.

Mr. HUBBARD.—He got it a little more than I thought it was.

Mr. SMISER.—That is a pretty close estimate.

Mr. HUBBARD.—Yes, that is close enough.

Q. The diagram we are using here would indicate that the "Forrester" swung close to the Bay trap?

A. I don't know which way she swung at the time.

(Testimony of Swan Swanson.)

Q. You can see on the diagram, that as it is drawn there it would indicate to a person who does not understand the situation—did you draw that diagram? A. Yes, sir.

Q. You see you have the dolphin away out of proportion to the other distances—you haven't drawn it to a scale, and the jury or a stranger looking at it might think the "Forrester" extended here between the two traps.

A. I didn't draw the "Forrester" or the scow.

Q. But the "Forrester," in your judgment, was about 1,600 to 1,800 feet away from the Bay trap, is that correct? A. Yes, just about that.

Q. Now, do you remember the position she was laying in at that time? Was she just in the position they put her in there—square with the shore line—parallel?

A. I don't remember that—in fact, I didn't pay any attention to it at that time.

Q. You cannot state whether it was laying broadside to the shore, or whether she was swinging out at an angle? A. No, sir.

Mr. HUBBARD.—That is all.

Redirect Examination.

(By Mr. SMISER.)

Q. You say at the time this boat came by floating-trap, when it was heading back in toward Hawk Inlet trap, that you and [113] Henry Alexander took a position on the reef, and that you shot at this boat. Now, I will ask you whether the boat had been shooting before you took this position and

(Testimony of Swan Swanson.)

began to shoot, or whether you opened *first* first?

A. On July 5th?

Q. Yes, on July 5th. A. I opened fire first.

Q. Before the boat fired?

A. Before the boat fired.

Q. Now, why did you open fire?

A. Well, I knew they were robbing a trap over there, and they hollered with it—they was hollering, and was calling those men down, and I knew they were robbing the traps.

Q. Now, you knew they were robbing the traps and you shot to prevent them from robbing the traps?

A. I did, to prevent them from robbing the traps.

Q. How many shots did the boat fire on that occasion after you shot at them,—how many shots did it fire on that occasion?

A. I think they must have fired pretty close to 50 shots.

Mr. SMISER.—That is all.

Recross-examination.

(By Mr. HUBBARD.)

Q. You say you were out on the point there on the 8th—out on the point as you have drawn it there? A. Yes, sir.

Q. Was the tide out?

A. It was low water, or pretty close to low water.

Q. It was low water at that time—any boat running around the floater at that time and turning

(Testimony of Swan Swanson.)

near the floater, they could not see anything about what was in the trap, could they? Do you think a person in that little boat you said came down and made kind of a little circle, then went right on off, and with low tide, could they see whether there was anything in that trap or not? [114]

A. That tide don't make any difference with a floating-trap.

Q. The tide don't make any difference with a floating-trap—it is all the same whether it is low or high tide with a floater? A. Yes, sir.

Q. She goes up and down with the tide?

A. Yes, sir.

Q. How far does that point you have put on the shore there—how far does that project out into the bay?

A. How far that point goes out into the bay?

Q. Yes. A. I don't quite get what you mean.

Q. You have given a point extending out there just this side of the lead of the floater trap?

A. Yes, sir.

Q. How far does that point extend out into the bay?

A. You mean from that place where the lead is connected to the shore?

Q. Yes—just this side of the lead.

A. I think that will be to that point, probably 600 or 700 feet.

Q. 600 or 700 feet to the floating trap?

A. Yes, I never measured it.

Q. But that is your estimate—and Henry Alex-

(Testimony of Swan Swanson.)

ander was on that point? A. Yes, sir.

Q. And he was shooting at the boat from that point?

A. I don't know what he was shooting at, but he was shooting.

Q. He went to that point, as far as you know?

A. Yes, sir.

Mr. HUBBARD.—That is all.

(Witness excused.) [115]

Testimony of Henry Alexander, for the Government.

HENRY ALEXANDER, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. SMISER.)

Q. What is your name? A. Henry Alexander.

Q. Where were you employed during the months of June and July, 1919?

A. I was at Admiralty Island.

Q. Were you at any time at Admiralty Cove during that time? A. Yes, sir.

Q. When did you go there?

A. I went there somewhere about the 20th of June.

Q. During July did you remain there?

A. Yes, sir.

Q. I will ask you if you were there on the morning of the 8th of July? A. Yes, sir.

(Testimony of Henry Alexander.)

Q. About 5 o'clock in the morning of July 8th where were you?

A. I went to bed at a quarter to five.

Q. What had you been doing the night previous?

A. I had been out watching.

Q. Watching what? A. A trap.

Q. You came in in the morning about a quarter to five and went to bed? A. Yes, sir.

Q. Where did you sleep?

A. Slept in a tent.

Q. Where was the tent located with reference to a cabin on the beach?

A. Why, just 300 feet from the cabin.

Q. In what direction.

A. Towards the floating-trap.

Q. About that time were you aroused by any one?

[116]

A. I don't know what time I was aroused—I was called by Mr. Swanson.

Q. What did you do when he called you?

A. I got up and went up to the floating-trap.

Q. Did you see any boat in there at that time?

A. Yes, sir.

Q. Where was the boat when you first saw it?

A. When I first saw the boat she was just off the floating-trap, passing.

Q. What direction was it going when you first saw it? A. Towards Hawk Inlet.

Q. How far from the floating-trap was she at that time?

A. Well, I should judge she was about 300 feet,

(Testimony of Henry Alexander.)

probably—something like that—I couldn't tell exactly.

Q. Did you watch the boat? A. Yes, sir.

Q. Where did it go?

A. Went around the point.

Q. What point was that?

A. Where the Hawk Inlet trap is up there.

Q. Now, there is a Hawk Inlet trap marked there on that diagram, isn't there?

A. Yes; that is this side of the point, however.

Q. That one is this side of the point. Now, point out on the map the point you say it went behind.

A. I guess it is this point here.

Q. I will ask you if there is any trap site around the point?

A. Yes, there is one but I don't know just where it is—there is one on the other side of the point.

Q. To whom does it belong?

A. I heard it belongs to—

Mr. HUBBARD.—We object to that unless he knows—if he knows it is all right.

The COURT.—If you know, answer the question.

A. I heard it belongs to the Hawk Inlet Fish Company. [117]

Q. Now, you say you saw the boat go around that point that morning? A. Yes, sir.

Q. After it went around that point did you hear anything that attracted your attention?

A. I heard some shooting.

Q. After hearing the shooting around there I will ask you if you saw the boat any more, the same

(Testimony of Henry Alexander.)

boat? A. Yes, I saw her come back.

Q. What course did she take in coming back?

A. Well, just followed the outside of the traps.

Q. Well, going in which direction?

A. Going back to Admiralty Bay.

Q. In the meantime had you changed your position from the tent and gone to any other point?

A. Yes, sir.

Q. Where had you gone?

A. I had gone just inside of the floating-trap.

Q. You notice where the map there shows the lead of the floating-trap? A. Yes, sir.

Q. Where had you gone with reference to that lead?

A. On that little point right there—I was on this side of it.

Q. Anyone go with you in that direction?

A. Mr. Swanson went with me?

Q. Where did you station yourself?

A. On that point.

Q. Which side of the point—next to the lead or on the opposite side from it?

A. No, right out on the point, in the center.

Q. Where was Mr. Swanson?

A. I don't know where Mr. Swanson was—he stopped before I got to the point.

Q. What was the character of the surface of that point—was it smooth or otherwise? [118]

A. No, it was rough.

Q. Could you see Mr. Swanson from where you were stationed? A. No, sir.

(Testimony of Henry Alexander.)

Q. After you were stationed there, which way was this boat moving that you saw, at that time?

A. It was moving towards the Admiralty Bay trap.

Q. Now, I will ask you if you heard anything—any shots fired—at that time?

A. Yes, I heard some shots.

Q. Where were they fired from?

A. Fired from this boat, on the vessel.

Q. After hearing these shots what did you do, if anything? A. I fired at the boat.

Q. How many shots did you fire at the boat?

A. Somewhere in the neighborhood of 20—25—I don't know—I didn't count them.

Q. Now, what did the boat do?

A. The boat then swung off shore.

Q. How far did it come before it swung offshore?

A. Well, just below the trap there—below the floater.

Q. Which trap?

A. The trap right above the cabin there.

Q. What do you call it?

A. I don't know what they call it.

Q. Well, look at the map there—do you know where the Bay trap is?

A. Yes, sir, it was the Bay trap.

Q. And about the Bay trap, you say, it swung off from the shore? A. Yes, sir.

Q. What was the boat doing, if anything, from the time it was coming from the floater-trap towards the Bay trap? A. It was firing.

(Testimony of Henry Alexander.)

Q. Could you tell in which direction the firing was.

A. Yes, I saw a few hit the water down there by where the "Forrester" and the scow was laying.
[119]

Q. You saw the bullets hitting the water?

A. Yes, sir.

Q. About how many shots were fired by the boat at that time?

A. I couldn't tell you that—I could guess at it.

Q. Estimate it as near as you can.

A. Somewhere near 40 or 50 shots.

Q. How far did the boat proceed, now, in the direction of the "Forrester" before it turned?

A. Well, I should judge somewhere just below the corner of the Bay trap.

Q. Was that the corner next to the "Forrester" or the one away from the "Forrester"?

A. Next to the "Forrester."

Q. Then which direction did it go?

A. Straight offshore.

Q. Did you recognize that boat? A. Yes, sir.

Q. What boat was it? A. The "Diana."

Q. Did you know the "Diana"?

A. Yes, sir; I saw her a few times.

Q. Had you seen the "Diana" at Admiralty Cove at any other time?

A. Yes, I saw her there on July 5th.

Q. On July 5th you saw it there? A. Yes.

Q. What time was that—day or night?

A. It was night.

(Testimony of Henry Alexander.)

Q. Where did you first see the boat?

A. Well, it was somewhere just off from that Bay trap—offshore there somewhere.

Q. How did you happen to see it there?

A. Well, I was out watching, patrolling.

Q. How were you going—were you on the water?

A. Yes, sir. [120]

Q. In a boat? A. Yes, sir.

Q. You were patrolling in a boat? A. Yes, sir.

Q. And just describe what you saw.

A. I just passed her.

Q. How close did you come to her?

A. Well, I would judge I was 300 or 400 feet from her.

Q. And you recognized the “Diana”? A. Yes.

Q. Which way did it go then?

A. Well, it was going up the shore towards the floating-trap.

Q. Towards the floating-trap? A. Yes, sir.

Q. Which way did you go? A. I went ashore.

Q. Where did you go ashore—at what point?

A. Right in front of the cabin.

Q. What did you do then?

A. I got Mr. Swanson.

Q. Well?

A. We went to the floating-trap, on the inside of it—at the reef.

Q. How did you go? A. In a boat.

Q. How did you go with reference to the Bay trap there? A. Pulled out around the Bay trap,

Q. You pulled out around the Bay trap and went

(Testimony of Henry Alexander.)

out on a reef? A. Yes, sir.

Q. How is that reef situated on the map there?

A. It is marked on the map just above the Bay trap.

Q. Will you tell the jury what indicates that—what mark? A. Right here.

Q. Where there is an “r” in a circle?

A. Yes, sir.

Q. You went to that reef with Mr. Swanson? [121]

A. Yes, sir; that reef is covered at high water—it was low water when we were there.

Q. Where was the boat when you reached the reef?

A. She was at the floating-trap.

Q. What was it doing?

A. I couldn't say exactly what it was doing—it was dark.

Q. I will ask you whether or not that trap was lifted? A. Yes, sir.

Q. Do you know whether there was any fish in the trap that night or not?

A. Yes, there was a few fish in it.

Q. The next morning were there any fish in it?

A. No.

Q. Now, when you took your position there on the reef what was done, if anything?

A. Well, there was some shooting occurred off the boat.

Q. How did that occur? Just go along and tell it.

A. Well, there was two watchmen stationed ashore that was supposed to give signals if anything happened.

(Testimony of Henry Alexander.)

Q. Where were they stationed?

A. Right inside of the floating-trap.

Q. The lead of the floating-trap? A. Yes, sir.

Q. On the shore? A. Yes, sir.

Q. What did they do?

A. They fired two shots from the beach.

Q. Go ahead and tell what happened.

A. For a signal; then there was some shooting off of the boat, and the boat was laying at the trap,

Q. After these signal shots were fired there was shooting from the boat laying at the floating-trap?

A. Yes, sir.

Q. Could you tell where those shots were going?

A. No, sir; I could not. [122]

Q. What did you do then?

A. We opened fire on them.

Q. How many shots did you fire?

A. I shot eight shots.

Q. How many did Mr. Swanson fire?

A. I couldn't say.

Q. Any more than you? A. I don't know.

Q. What did the boat do when you opened fire?

A. They stayed there, I guess—they were there when we went ashore.

Q. Why did you go ashore?

A. I had no more ammunition.

Q. You had no more ammunition? A. No, sir.

Q. Then you went ashore? A. Yes, sir.

Q. What did the boat do after that?

A. She continued there for a while, and then left—went straight offshore.

(Testimony of Henry Alexander.)

Q. Did she do any more shooting?

A. No, sir, not after she left.

Q. I know, but before she left did they do any shooting?

A. Yes, they shot shots after we went ashore.

Q. Do you know which way those shots went?

A. No, sir; I don't.

Q. Which way did the boat take when it left?

A. Went offshore.

Q. You say you recognized the boat as the "Diana"? A. Yes, sir.

Q. Did you hear anything said on that occasion by any one on the boat?

A. Yes, I heard some hollering.

Q. Do you know Ike Weathers' voice?

A. No, I don't know Ike Weathers very well.

Q. I mean Al Weathers? [123]

A. Yes, I heard a voice from the boat that I thought and took to be Al Weathers'.

Q. How long have you known Al Weathers?

A. I have known Al Weathers since 1915.

Q. Did you ever work where he worked?

A. Yes, I worked at the cannery where he worked.

Q. What kind of a voice has Al Weathers?

A. A very shrill, loud voice.

Q. And you heard that voice, you say, when you were on the reef? A. Yes, sir.

Q. Was that boat in there at any other time while you were there? A. No, sir.

Q. On the 29th of June were you there?

A. No, sir; I wasn't there.

(Testimony of Henry Alexander.)

Q. You went there on the 20th?

A. Yes, but I wasn't there on the 29th.

Q. You were not there on the 29th? A. No, sir.

Q. Had gone away somewhere. You were not there in June, I believe, prior to the 20th?

A. No, sir.

Q. On the 5th of July, I will ask you whether or not there were any shots fired in the direction of the cabin?

A. Well, that I couldn't say—I wasn't at the cabin.

Q. Did you find out afterwards?

A. Well, I heard some of the fellows say—

Mr. HUBBARD.—I object to his testifying to what others told him.

The COURT.—That may be stricken.

Q. Not what they said. Do you know when a barricade was built up in front of the cabin?

A. No, sir.

Mr. HUBBARD.—I think we will object to that, if the Court please—it is immaterial when they built that there.

Mr. SMISER.—He says he does not know. [124]

Q. Did you see any men on the boat "Diana" when she was in there the morning of the 8th of July?

A. No, sir.

Mr. SMISER.—Take the witness.

Cross-examination.

(By Mr. HUBBARD.)

Q. When did you say it was you got acquainted with Al Weathers? A. 1915, I think.

Q. What was he doing?

(Testimony of Henry Alexander.)

A. Working at the cannery.

Q. Do you remember how long he stayed there?

A. No, sir; I don't.

Q. Was he there some time?

A. That I couldn't tell you because we wasn't together all the time. I didn't work with Al Weathers. He was working in the cannery most of the time and I was working outside.

Q. Do you remember who he was working for at that time?

A. No; I don't know who he was working for—he was working in the cannery.

Q. Working in the cannery—he wasn't working for the company—he, was working for a contractor, wasn't he? A. I think so.

Q. Do you know Ike Weathers?

A. Why, I just know Ike as I see him.

Q. Was Ike working out there?

A. Ike was on one of the boats, I believe.

Q. He wasn't working at the cannery—he was on one of the boats?

A. Yes; he was on one of the boats.

Q. But the defendant here, you say, was working in the cannery? A. Yes, sir.

Q. Where was he when he did the hollering by which you learned his voice?

A. I don't know as I ever heard him holler around the cannery. [125]

Q. If you never heard him holler in 1915 how did you recognize his voice when he hollered in 1919?

A. Don't you suppose if you got out here and hol-

(Testimony of Henry Alexander.)

lered I would recognize your voice?

Q. I don't believe I would recognize yours, Henry, although you have testified so much in this case. You say you don't recall that the defendant here did any hollering at the cannery at all?

A. Not that I know of; no.

Q. But four years afterwards you heard a voice on a boat and you immediately decided it was the voice of the defendant here—is that correct?

A. I heard him two different times over there.

Q. If you didn't know the voice the first time, the fact that you heard him the second time, how would that in any way aid you in the matter?

A. Well, I think I could tell the voice if I heard it again.

Q. You have stated to the jury the only way you have now of distinguishing his voice, have you?

A. Yes, sir.

Q. You have no other way you want to give to the jury as to how you arrived at the fact that it was his voice? A. No, sir.

Q. What did you say was the first time you saw the boat some there? A. On July 5th.

Q. That was the first time you were present, on July 5th? A. Yes, sir.

Q. You were not there earlier than that?

A. I was there earlier but I never saw the boat.

Q. You never saw this boat earlier than July 5th?

A. No, sir.

Q. You commenced working there June 20th?

A. Yes, sir.

(Testimony of Henry Alexander.)

Q. You were there on June 29th, were you, at Admiralty Cove?

A. No, sir; I wasn't there on the 29th. [126]

Q. You were there July 5th? A. Yes, sir.

Q. And it was on that occasion that you say a boat came to the floating-trap, was it, or the Bay trap?

A. Floating-trap.

Q. It came to the Bay trap on July 5th?

A. No, I said the floating-trap.

Q. To the floating-trap,—and where were you at the time it came there? A. On the 5th?

Q. Yes. A. I was ashore asleep.

Q. You were ashore asleep on July 5th?

A. Yes, sir, at 5 o'clock in the morning; I went to bed about five—a quarter to five.

Q. I am asking you about July 5th.

A. Oh, July 5th?

Q. Yes.

A. July 5th I was up when the boat came—I was out on the water.

Q. It was light, was it? A. No, sir.

Q. You were out on the water, you say?

A. Yes, sir.

Q. Where had you been?

A. I had been up and down along the line of the traps.

Q. Which way did you come in?

A. Pretty near straight offshore when I came in there—I made a round up above the floating-trap, and then back down again.

Q. You were around up above the floating-trap and

(Testimony of Henry Alexander.)

then came back to the dolphin? A. Yes, sir.

Q. And then you went ashore from there, did you?

A. Yes, sir.

Q. And then who did you see, or what did you do, if anything, after that? [127]

A. I passed a boat when I was coming in.

Q. Which way was the boat headed?

A. Headed towards the floating-trap.

Q. Headed in the direction of the floating-trap?

A. Yes, sir.

Q. Did the boat run past you, or did you meet the boat?

A. No; we were pretty near running the same course.

Q. But the boat went right by you? A. Yes, sir.

Q. You had come from Admiralty trap No. 1, or that direction?

A. No, I came from straight offshore in there—I was way outside and came in.

Q. You had been a way outside? A. Yes, sir.

Q. When you saw the boat was it outside of the traps?

A. Yes, it was just outside of what we call the Bay trap.

Q. And after you saw the boat you went in and put your boat away, or did you get somebody else and then go in the same boat?

A. No, sir; I went in and got Mr. Swanson.

Q. Did you use the same boat you came in on?

A. No, sir.

Q. After you got Mr. Swanson you took a skiff and

(Testimony of Henry Alexander.)

went to some other place? A. Yes, sir.

Q. You went around to what point?

A. I went around the Bay trap to that reef you see there.

Q. Went around to where it is marked reef?

A. Yes, sir.

Q. And there you stopped? A. Yes, sir.

Q. From that point what did you see?

A. I saw a boat laying at the trap.

Q. At what trap? A. The floating-trap. [128]

Q. How far was the reef from the floating-trap?

A. That I couldn't tell you, the distance, because I never measured that distance.

Q. Is it 2,000 feet?

A. Well, sir, I don't know what the distance is—there is no use for me to estimate it when I don't know what it is.

Q. Anyway, you were on the reef? A. Yes, sir.

Q. And it was from that distance you saw the boat at the trap? A. Yes, sir.

Q. And this was what time in the morning?

A. Well, it was between one o'clock and daylight some time.

Q. It was dark then? A. Yes, sir.

Q. You could see the boat so as to distinguish it?

A. I could see the boat when it passed outside to know what it was.

Q. But the boat that was at the trap, you couldn't recognize that?

A. Yes, sir, because I saw her go straight there.

Q. You kept watch on her? A. Yes, sir.

(Testimony of Henry Alexander.)

Q. While you were in getting Mr. Swanson and all, you still had your eye on the boat, did you?

A. The boat was at the trap before I got in there.

Q. You waited until she got to the trap before you started out? A. Yes, sir.

Q. And you could see all the time? A. Yes, sir.

Q. From where you were to the trap was something like half a mile, wasn't it?

A. I don't know what the distance was.

Q. I will ask you where you were when you got Mr. Swanson?

A. I was at the cabin—I had just pulled ashore.

Q. You saw this boat over at the floater from the cabin? A. Yes, sir. [129]

Q. What did you see—anything but the lights?

A. I saw the lights, yes.

Q. Anything else? A. No.

Q. You couldn't see anything else except the lights?

A. No.

Q. Are you certain you were not looking at trap lights?

A. No, sir; I wasn't looking at trap lights—I know a trap light from a boat.

Q. Then you took a boat, you and Mr. Swanson, and went around to the reef, and from there you say you did some shooting at the boat? A. Yes, sir.

Q. But the boat that was there hadn't fired any shots at you?

A. Yes, sir; they fired shots before ever I reached the reef.

Q. The first shooting, as I understand, was what

(Testimony of Henry Alexander.)

you call signal shots? A. Yes, sir, from the shore.

Q. Who fired the signal shot?

A. Mr. Stenso was one of them.

Q. You think he fired the signal shots?

A. Yes, he was one of them—the other man I don't know.

Q. After the signal shots were fired, then you say there was some shooting from the trap where—

A. From the boat that was at the trap.

Q. Where was the shooting from the boat—at what point? A. I don't know where they were.

Q. You don't know where they fired or what they fired at? A. No, sir.

Q. You heard the shooting? A. I did; yes, sir.

Q. Going to the 8th, did I understand you to say you fired about 25 shots at the small boat?

A. Yes, sir. [130]

Q. How large was that boat?

A. Well, I should judge it was somewhere in the neighborhood of 40 or 45 feet.

Q. Well, are you pretty well satisfied she was about a 45 foot boat?

A. No, sir, I couldn't tell you.

Q. I would like you to tell us what size boat it was you were firing at.

A. I am just guessing at that—I never measured the boat.

Q. You have seen the boat, haven't you, often?

A. Yes, sir, that is all, but I couldn't tell the exact length of it.

Q. How many shots did you say you fired at that

(Testimony of Henry Alexander.)

boat? A. Somewhere about 25.

Q. Didn't you shoot more than that, Henry?

A. No.

Q. About 25, you say? A. Somewhere about 25.

Q. And you were shooting from a point just inside the floater? A. Yes.

Q. How high were you above the water there?

A. Somewhere about 25—maybe a little higher.

Q. Wasn't it more than that?

A. No, I don't think so—somewhere about 25 feet from the water mark.

Q. That was the point,—had you made any preparations for defense at that point? A. No, sir.

Q. Just walked up there on the rock where you had a good view? A. No, sir.

Q. And where you commenced your firing?

A. Yes, sir.

Q. Was there any timber there—any trees or anything? A. There was a few trees there, yes.

Q. Were you in front of them? [131]

A. No, sir.

Q. Which side of the reef were you on?

A. I was right out on the beach line.

Q. And it was from that point that you fired at the boat? A. Yes, sir.

Q. Could you see Mr. Swanson—where he was?

A. No, sir; I left Mr. Swanson before I got to the point.

Q. The boat turned out to sea after the shooting had taken place—the boat turned out to sea at a place marked A on that diagram, is that right?

(Testimony of Henry Alexander.)

A. Yes, it was somewhere about there.

Q. Went straight out to sea? A. Yes, sir.

Q. Where you were you could distinctly see that?

A. Yes, sir.

Q. You were higher up than the water—25 feet?

A. Yes, sir.

Q. You could see distinctly that the boat at the point A off the Bay trap—

A. I couldn't tell you if it was right at the point—it was somewhere near that place.

Q. She turned and went straight out to sea?

A. Yes, sir.

Q. That was on the 8th of the month. You notice on the diagram, Henry, there is a little "c" right off the floater trap? A. Off the floater?

Q. Yes. A. Well, yes.

Q. When you testified in the case here before didn't you fix the point at that point where she turned out to sea?

A. No, sir, that is where the boat was when I first fired at her.

Q. That is where the boat was when you first fired at her?

A. Yes, sir; I never stated that the boat turned off shore there.

Q. The floater? [132]

A. No, sir.

Q. At the time you were shooting at her did you know that any shots had been fired at the "Forrester"? A. Yes, sir.

Q. How did you know it?

(Testimony of Henry Alexander.)

A. Because I heard it from the boat—I heard the reports.

Q. You could hear the shooting out on the boat?

A. Yes, sir.

Q. Therefore you knew the shots were being fired at the “Forrester,” is that it? A. Yes, sir.

Q. At that time the boat was three or four thousand feet away from the “Forrester”?

A. Well, I don’t know what the distance is—I never measured it.

Q. And the boat was at least 2,000 feet away from you? A. That I couldn’t tell you.

Mr. HUBBARD.—That is all.

(Witness excused.)

Testimony of Andrew Abrahamson, for the Government.

ANDREW ABRAHAMSON, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

—Direct Examination.

(By Mr. SMISER.)

Q. Please state your name.

A. Andrew Abrahamson.

Q. Where were you working during June and July, 1919? A. Admiralty Island.

Q. What company were you employed by?

A. Hoonah Packing Company.

Q. What was your business?

A. Trap watchman. [133]

(Testimony of Andrew Abrahamson.)

Q. What trap did you watch? A. No. 1 trap.

Q. Admiralty No. 1? A. Yes.

Q. Were you there on the morning of July 8, 1919?

A. Yes, sir.

Q. Where were you about 5 o'clock in the morning?

A. I was at the shack on the beach.

Q. What were you doing? A. I was in bed.

Q. Do you know whether any boat came in there about that time? A. Yes, there was.

Q. Did you receive any information to that effect—did you learn it at that time?

A. The watchman called me.

Q. What did you do when he called you?

A. I got up.

Q. Did you look out? A. Yes, sir.

Q. Where was the boat when you first looked out?

A. It was right about opposite No. 1 trap.

Q. What course was it taking?

A. Heading towards Hawk Inlet.

Q. In going in that direction did it pass any of the traps of the Hoonah Packing Company?

A. Yes, it passed two of them.

Q. Which ones did it pass?

A. Passed trap No. 1 and floating-trap No. 4.

Q. Which one did it pass nearer to?

A. The floating-trap.

Q. In passing the floating-trap I will ask you if you saw it make any change in the way it was traveling? A. Yes, it slowed down some.

Q. How close did it come to the floater? [134]

A. I couldn't say exactly—from 50 to 100 feet.

(Testimony of Andrew Abrahamson.)

Q. Then what did it do?

A. It went over to Hawk Inlet.

Q. Look up at the map there—do you see a point out to the far left of the map? A. Yes.

Q. Is that the point you refer to?

A. Yes; they run around that point, and there is an inlet in there—a little bight.

Q. Is there a trap in there?

A. Yes, I think there are two traps.

Q. Whose traps? A. Hawk Inlet traps.

Q. Now, after the boat had passed around that point could you see it?

A. No, I couldn't see it when it was in the inlet.

Q. Did you hear anything about that time?

A. I heard some shots fired.

Q. After you heard those shots fired did you see that boat any more?

A. Yes, I seen it once coming out from the inlet—then it went back in again.

Q. Now, when it came around that point what course did it take?

A. When it came back it was heading towards floating-trap No. 4.

Q. How close did it come to floating-trap No. 4 at that time?

A. When I first seen it it was about a thousand feet from floating-trap.

Q. What did they do at that time?

A. They started firing from the boat.

Q. Could you tell what direction they were firing?

A. No, not exactly what direction.

(Testimony of Andrew Abrahamson.)

Q. Where were you? A. I was at the shack.

Q. Well, from the time you saw it firing which way was the boat going? [135]

A. Heading towards the floating-trap.

Q. What did you do at that time?

A. Went out and got behind some logs that were built up in front of the cabin.

Q. Did you notice which way the boat went on its course at that time?

A. Yes, it was heading down towards the floating-trap—past the floating-trap and on down towards the Bay trap.

Q. How far in that direction did it come?

A. About right out from the Bay trap.

Q. Then what did it do? A. Struck out.

Q. What was the boat doing at the time it was coming from the floating-trap to the Bay trap?

A. Firing shots.

Q. About how many shots were fired?

A. About 40 or 50 shots, I guess—they were firing from shore too, I heard afterwards.

Q. Now, where were those shots being fired?

A. Right in between the floating-trap and the Bay trap.

Q. Do you know who was down there? A. Yes.

Q. Who? A. Swan and Henry Alexander.

Q. After this boat came down to opposite the Bay trap where did it go?

A. It went over across to Whitestone Harbor.

Q. Is that out across the bay? A. Yes.

Q. Where was the "Forrester" lying at that time?

(Testimony of Andrew Abrahamson.)

A. It was laying to a dolphin down by No. 1 trap—close to No. 1.

Q. How was that position in regard to the course that the boat was coming from floating-trap to the Bay trap—was it on the same course?

A. I don't understand. [136]

Q. Was it on the same course that the boat took when it come from the floater towards the Bay trap—was this "Forrester" in that same direction?

A. No, not exactly.

Q. Well, near to it?

A. The "Forrester" was laying kind of in the bay.

Q. In a general way is the map there correct?

A. Yes.

Q. That shows the position of the boat and the two traps? A. Yes.

Q. Then when the boat was at the floating-trap and came towards the Bay trap would it be nearer the "Forrester" than it had been to the floater?

A. Yes, it would be nearer to the "Forrester."

Q. Did you see where any of these bullets were striking? A. No, I did not.

Q. At that time where were you?

A. At the back—behind the fortification we had there.

Q. Do you know when that fortification was built up there?

Mr. HUBBARD.—I think we will object to that, if the Court please.

The COURT.—I do not see how it helps or hurts—what difference does it make when it was built?

(Testimony of Andrew Abrahamson.)

Mr. SMISER.—All right; just one of the occurrences that took place that I would like to prove about the surroundings there, to be weighed by the jury.

The COURT.—Yes, but it might have been built two days before this occurrence, or it might have been built one day before—it would not be evidence one way or the other—it would not prove anything.

Q. After the boat left did you go over to the “Forrester”? A. No, I didn’t.

Q. You didn’t examine the “Forrester”?

A. No.

Q. I will ask you if you were at that same point on the 5th of [137] July?

A. Yes, sir.

Q. I will ask you whether any boat came there on the 5th of July? A. Yes, there was.

Q. Before I leave that point, I will ask you if you recognized the boat on the 8th that I was asking you about? A. Yes, I did.

Q. What boat was it? A. The “Diana.”

Q. Now, I will ask you if there was a boat there on the 5th of July? A. Yes, sir.

Q. What time was it?

A. About one o’clock at night, I should judge—between twelve and one.

Q. Where did it go to—to what point did it go that time?

A. Went down towards the floating-trap.

Q. Do you know whether the floating-trap was lifted at that time or not? A. Yes, it was lifted.

(Testimony of Andrew Abrahamson.)

Q. It was lifted? A. Yes, it was.

Q. Where was the boat when you saw it on that occasion, on the 5th?

A. Henry Alexander was the foreman and he came in and woke us up, and we all got up and looked out of the door, and at that time the boat was heading down towards the direction of the floating-trap, and it was dark, at night, so we couldn't exactly see the boat plain.

Q. Well, what happened after that?

A. After Henry woke us up in the shack, Henry and Swanson took a skiff and rowed out towards the Bay trap, and there was some shots fired, and then after that we stood in the cabin door and heard a bullet come passing right by the shack, and we ducked out—went out the other door—we had a door on the other [138] side of the cabin, and went up in the woods.

Q. Who was with you?

A. Herman Mitts and Ivar Stenso.

Q. What did you go up in the woods for?

A. We got scared.

Q. What purpose did you go up there for?

A. To hide.

Q. What did you do when you went up there?

A. Well, hid behind some big trees.

Q. How many shots did you hear fired?

A. 30 or 40 shots.

Q. After you left the cabin did you hear any bullets? A. Yes, I heard bullets in the woods.

Q. How far did the boat come from the direction

(Testimony of Andrew Abrahamson.)

of the floater in the direction of the cabin at that time?

A. It was pretty dark at night and I couldn't exactly say.

Q. Could you give some idea with reference to the Bay trap how far they came in that direction?

A. During all of the shooting it was laying at the Bay trap.

Q. When it was doing this shooting, I understand you to say, it was coming towards the Bay trap—did you state that?

A. No, the floating-trap—it passed back of the Bay trap and went up to the floating-trap.

Q. It passed by the Bay trap and went up to the floating-trap, and robbed the floating-trap, as I understand? A. Yes.

Q. And then the shooting occurred? A. Yes.

Q. And which way was it going at the time the shooting was going on, if you know?

A. It was laying at the floating-trap.

Q. Then when they left which way did it go?

A. Come right by the Bay trap again, and we were up in the woods at that time so I couldn't see which direction it went from there. [139]

Q. Could you distinguish the boat at that time?

A. No, I couldn't.

Q. You couldn't? A. No.

Q. I will ask you if you were there at that same point on the 29th day of June, 1919?

A. Yes, sir.

Q. I will ask you whether any boat came there at

(Testimony of Andrew Abrahamson.)

that time? A. This boat did.

Q. What time did it come there?

A. Around about 7 o'clock in the morning.

Q. Where were you at that time?

A. In the shack.

Q. Were you informed of the presence of the boat being there—anybody tell you about it?

A. No, I went outside and I seen the boat.

Q. How did you happen to go outside?

A. The cook, I believe, called us for breakfast and we were going to get up for breakfast.

Q. You went outside and saw the boat?

A. Yes, sir.

Q. About what time in the morning?

A. About 7 o'clock.

Q. Where was the boat when you first saw it on that occasion?

A. It was a little past the shack—between the shack and the Bay trap.

Q. Between the shack and the Bay trap?

A. Yes.

Q. Which way was it heading?

A. Up to the floating-trap.

Q. Where did it go?

A. It went right into the floating-trap.

Q. What did it do there?

A. Started to lift. [140]

Q. Started to lift it—did it do it? A. Yes, sir.

Q. Did you see them lifting it? A. I did.

Q. How many men were on it? A. Three men.

Q. Could you describe the appearance of those

(Testimony of Andrew Abrahamson.)

men? A. No, not exactly at that time.

Q. Could you tell whether they were the same size or not? A. No, they wasn't the same size.

Q. In what way did they differ in size?

A. There was two small fellows, and one tall fellow.

Q. How about the larger man's size—how did that compare with the defendant, Al Weathers, here, in size?

A. Well, I couldn't say exactly—it was about 4,000 feet up to that.

Q. It was too far for you to see? A. Yes.

Q. After lifting the trap what did the boat do?

A. They lifted the trap and went away.

Q. Do you know whether that trap had fish in it at the time or not?

A. The watchman said it had—I never seen the fish.

Mr. HUBBARD.—We object, now.

Mr. SMISER.—I don't want what the watchman said unless you know it yourself.

Q. Was there any shooting done on that occasion?

A. No, sir.

Q. Did you recognize that boat on that occasion you have just testified to, the 29th?

A. Yes, sir, I did.

Q. What boat was it? A. The "Diana."

Q. Were you at this point, Admiralty Cove, about the middle of June—around the 17th?

A. Yes, I was. [141]

Q. I will ask you whether you saw a boat come in there at that time? A. Yes, sir.

(Testimony of Andrew Abrahamson.)

Q. What time was that?

A. Between 11 and 12, I should think, at night.

Q. 11 and 12 o'clock at night,—where was the boat when you first saw it?

A. About 50 feet out from the No. 1 trap.

Q. Where were you? A. I was at the shack.

Q. You were at the shack? A. Yes, sir.

Q. What did you do when you saw the boat in that position?

A. When I first seen them they were coming into the trap, and they landed at No. 1 trap, and I followed from the beach and told them to get away from there and they said something, but I couldn't exactly hear what it was; and I took a skiff and rowed out, and when I got out about 50 feet, I should judge. from the boat, two fellows was up on the capping and one on the boat, and I heard one fellow on the boat say, "Let her go," and they let go of the trap and went out a little ways, and they come up on deck and told me to beat it inshore or they would knock my block off.

Q. What did you do then?

A. I took the skiff and rowed ashore.

Q. You took their advice? A. Yes, sir.

Q. What did the boat proceed to do?

A. It went down to the floating-trap.

Q. What did it do down there?

A. It lifted the floating-trap, and when it got through with the floating-trap it came back and lifted the Bay trap.

Q. I will ask you if you recognized that boat?

(Testimony of Andrew Abrahamson.)

A. I did. [142]

Q. What boat was it?

A. Not that night I didn't recognize the boat—it was between 11 and 12 and I didn't see the name on it.

Q. Did you know Al Weathers at that time?

A. No, I did not.

Q. Have you got acquainted with him since, by sight? A. Yes, by sight—I seen him here.

Q. Are you able to say whether that was him or not on that occasion?

A. I didn't see the man's face—I wouldn't say it was him, but the size of the man was pretty much like him.

Q. How about the size of the other two men in comparison with the size of Ike Weathers and Ernest Stage? A. Pretty much like them.

Q. You have seen them here? A. Yes, I have.

Q. I will ask you if you were at Admiralty Cove on June 10th? A. I was not.

Q. You were not there June 10th? A. No.

Q. What time did you go there?

A. Around the 14th, I think.

Mr. SMISER.—Take the witness.

Cross-examination.

(By Mr. RODEN.)

Q. Now, on the morning of the 8th, you say the watchman came up into the cabin there and woke you up? A. Yes, sir.

Q. And you put on your clothes and went outside and took a look? A. Yes, sir.

(Testimony of Andrew Abrahamson.)

Q. And you found the boat opposite No. 1 trap—is that correct? A. No, I didn't.

Q. Where did you find it?

A. When I first seen the boat it was about 50 feet out from [143] No. 1—maybe a little past No. 1—I cannot remember exactly the distance.

Q. So I am right, after all—so you saw it opposite No. 1 trap? A. Yes.

Q. About 50 feet from No. 1 trap? A. Yes.

Q. And she was heading what direction?

A. Towards the floating-trap No. 4.

Q. Wasn't she heading in the direction of the Bay trap? A. She passed that Bay trap.

Q. And she was also heading in the direction of the Hawk Inlet trap, wasn't she? A. Yes.

Q. All right. Which trap is sticking out the farthest into the water, the Bay trap or the floater?

A. The floater.

Q. And which one is farthest out, the floater or the Hawk Inlet? A. The floater, I should judge.

Q. The floater sticks out farther than any of the other traps? A. I think it does, yes.

Q. And you estimate she came within 100 or 150 feet of the floater as she passed on down?

A. About 50 or 100 feet.

Q. And where did the boat go then?

A. Went down to Hawk Inlet.

Q. What did you do while she was gone?

A. Stood in the cabin door and looked at it.

Q. And when she showed up again you went behind the breastwords, did you? A. Yes, sir.

(Testimony of Andrew Abrahamson.)

Q. And remained there until when?

A. Remained there until she left.

Q. Where was she when she pulled out from there, the time you saw her last? [144]

A. Right about opposite the Bay trap.

Q. How far out was she from the Bay trap?

A. Oh, a couple of hundred feet, probably, when I seen her last—she kept on going across to White-stone Harbor.

Q. You took a little peep from the breastworks, I suppose, once in a while? A. I did.

Q. That is how you saw her when she was about 100 feet from the Bay trap? A. Yes.

Q. Now, on July 5th it was about 2 o'clock in the morning? A. About 12 o'clock, I guess.

Q. And you were in bed at that time, too?

A. Yes, sir.

Q. And it was Henry Alexander that came and woke you up? A. Yes, sir.

Q. Then you put on your clothes again, and you went out, and after you came out you saw this boat pulling up towards the floater?

A. Not on the 5th.

Q. Where did you see her after you got up on the 5th?

A. I seen her between the Bay trap and the shack, but I didn't put on my clothes.

Q. You saw her between the Bay trap and the shack? A. Yes, sir.

Q. That was on the 5th? A. Yes, sir.

Q. And before you had put on your clothes?

(Testimony of Andrew Abrahamson.)

A. Yes, sir.

Q. And that was after Henry Alexander had called you? A. Yes, sir.

Q. Between the Bay trap and the shack?

A. Yes, sir.

Q. She had not passed the Bay trap, had she?

A. No, she had not passed the Bay trap. [145]

Q. You don't know whether she took any fish out of that trap or not, do you, when she pulled up to the Bay trap? A. No, I didn't see the fish.

Q. And it was, I believe you said, on the 29th when you saw her again? A. Yes, sir.

Q. It was in the morning—and again you saw her on the 17th? A. Yes, sir.

Q. How close did you get to her on the 17th?

A. About 50 feet of her.

Q. She was then tied up to which trap?

A. No. 1.

Q. Did she have any lights on?

A. No, no lights.

Q. The boat was dark? A. Yes, sir.

Q. Was the trap light burning?

A. Yes, it was.

Q. One or two lights burning on the trap?

A. One light.

Q. Could you see the boat distinctly at that time?

A. Yes, I could see the boat.

Q. In what position were you with relation to the boat? A. I was on the stern of the boat.

Q. On the stern, and within 50 feet?

A. Yes, sir.

(Testimony of Andrew Abrahamson.)

Q. You had no lights on your boat, I suppose?

A. No, I didn't.

Q. What kind of boat did you have—a skiff or an engine boat? A. Had a skiff.

Q. You couldn't see any name on the boat at that time, could you? A. No, I couldn't.

Q. Couldn't make out the name of the boat?

A. No, sir. [146]

Q. But you could see the men on the boat?

A. Yes, sir.

Q. And one of them was a tall man?

A. Yes, sir.

Q. And the other one wasn't so tall?

A. No.

Q. And the other one was still a little less tall?

A. Yes, sir.

Q. When did you know for the first time that this boat was the "Diana"?

A. I seen her here, down to the float, when we come into Juneau.

Q. How did you happen to see her that time?

A. Why, all of us, we come in and we took a walk down to the city dock.

Q. Who took you down there?

A. There was, I think it was the game warden—a fellow from the courthouse.

Q. Do you remember the game warden's name?

A. No, I don't.

Q. Would you recollect his name if I mentioned it—was it Lund? A. I don't remember.

Mr. RODEN.—That is all.

(Testimony of Andrew Abrahamson.)

Redirect Examination.

(By Mr. SMISER.)

Q. I will ask you whether or not you identified the boat yourself, or whether anyone suggested to you anything about which boat it was?

A. I identified the boat when I seen it.

Q. Did the game warden point it out to you?

A. No, not exactly.

Mr. SMISER.—That is all.

Q. (By Mr. RODEN.) But the game warden took you all in tow and took you down to the boat, didn't he? [147]

A. Yes, we all went down together.

Q. (By Mr. SMISER.) Were there any other boats there? A. The "Diana" was there.

Q. (By Mr. SMISER.) I say, were there any other boats except that?

A. Yes, lots of other boats.

Mr. SMISER.—That is all.

(Witness excused.)

(Whereupon court adjourned until 10 o'clock tomorrow morning.)

MORNING SESSION.

February 13, 1919, 10 A. M.

Testimony of Herman Mitts, for the Government.

HERMAN MITTS, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

(Testimony of Herman Mitts.)

Direct Examination.

(By Mr. SMISER.)

Q. Please state your name. A. Herman Mitts.

Q. Where were you working all during the months of June and July, 1919?

A. Well, I was working around the cannery for the Hoonah Packing Company in June, and the first of July I went out to Admiralty Cove there watching trap.

Q. What time did you go out to Admiralty Cove?

A. I got there the first day of July.

Q. Were you there on the morning of the 8th of July? A. Yes, sir.

Q. Where were you about 5 o'clock?

A. I was in the cabin.

Q. Were you in bed or up?

A. Well, I woke up between 4 and 5 o'clock in the morning—something like that.

Q. Did you see a boat come in there that morning? [148]

A. Yes, I saw a boat come around the point from Funter Bay there.

Q. Come around the point and go to Funter Bay—where is that with reference to Admiralty trap No. 1—in that direction?

A. Yes; this boat come by No. 1 trap.

Q. What way was it headed?

A. Towards Hawk Inlet.

Q. *When* general route did not go from near Admiralty trap No. 1 toward Hawk Inlet trap?

A. Well, it went by the trap—by the No. 1 trap,

(Testimony of Herman Mitts.)

and then the Bay trap, and floating-trap, and when it got up to the floating-trap it kind of slowed up a little bit, it looked to me.

Q. Then where did it go?

A. Then kept on going until it got behind the point there where Hawk Inlet got a trap.

Q. Got behind the point where the Hawk Inlet has a trap? A. Yes.

Q. Could you see it after it passed around the point?

A. Well, no; not after it got around the point there—it kind of turned—it got out of sight.

Q. After it got around that point did you hear anything that attracted your attention?

A. I heard some shooting.

Q. After you heard the shooting around that point did you see the boat any more?

A. Well, after they quit shooting, I sat down and put my clothes on, and a little while after I heard some shooting again and I went and looked out of the door and I saw this same boat coming back.

Q. Where was it with reference to the floater-trap No. 4 at the time you saw it the second time?

A. When I got out I judge it was about a thousand feet or so from the floating-trap.

Q. About a thousand feet in what direction from the floater—that is, was it on the side next to you, beyond you out in [149] the water, or where was it?

(Testimony of Herman Mitts.)

A. Well, it wasn't on my side—more like on the other side.

Q. Go around to the board and look at that little map and show us about where the boat was when you first saw it after it came back around the point—you understand that map, do you?

A. Yes—this is the floating-trap?

Q. That is floating-trap No. 4.

A. Here is the cabin?

Q. Yes.

A. Well, it was something about there when I saw it.

Q. Stand back—it was somewhere about there?

A. Yes.

Q. About a thousand feet in that direction off the floater? A. Yes.

Q. Which way did it travel after that?

A. Well, it come out something like this until it got out to,—this is the Bay trap—it got up to here somewheres, then kind of turned out towards sea.

Q. It came in the direction of the Bay trap?

A. Yes, something.

Q. Something in the direction of the Bay trap?

A. Yes.

Q. And then turned out to sea. Now, from the time you saw it there near the floater-trap did anything happen—did you hear anything happen?

A. They were shooting.

Q. Could you tell what direction they were shooting?

A. No, I couldn't tell—I was behind some rocks

(Testimony of Herman Mitts.)
and logs we had piled up there.

Q. In front of the cabin?

A. Yes, in front of the cabin.

Q. Where was the "Forrester" laying at that time?

A. The "Forrester" was tied up to a dolphin close to trap No. 1.

Q. Did you look at the "Forrester" to see,—at that time could you [150] tell where the shots were going?

A. No, I couldn't tell where the shots were going.

Q. About how many shots do you think you heard at that time?

A. Oh, I judge between 40 and 60 shots—I couldn't say which would be nearer, 40 or 60.

Q. I will ask you whether or not you recognized the boat at that time.

A. Well, that was the first time I remember seeing that boat.

Q. It was the first time you had seen that boat?

A. And I was too far away to see the name on it.

Q. Did you see that boat after that anywhere?

A. Well, I don't know—I saw a boat in Juneau that looks like it, but I couldn't say if it was the same boat. I wouldn't swear to it.

Q. What boat was that? A. The "Diana."

Q. Where did you see it? A. The City float.

Q. I will ask you if you were at Admiralty Cove on the 5th of July, 1919? A. Yes, I was there.

Q. I will ask you if anything happened there that night, unusual?

(Testimony of Herman Mitts.)

A. Well, yes; about one o'clock a boat was over there, and I don't know whether it was tied up to the floating-trap—it was dark and I couldn't see, but they were close by the floating-trap anyway.

Q. There was a boat near the floating-trap?

A. There was quite a number of shots fired.

Q. Where were you at that time?

A. I was in the cabin.

Q. Who else was in the cabin, if anybody—how many men?

A. There was five of us, I think—five or six.

Q. Could you tell where the shots were lighting at that time?

A. Well, I heard a few bullets over the cabin.
[151]

Q. What did you and the other men in the cabin do at that time?

A. We went out behind the shack and got behind some trees.

Q. Did you hear any bullets out there after you went out of the cabin?

A. Yes, I heard, I suppose it was bullets—I heard limbs cracking a couple or three times, and I had an idea it was from the bullets.

Q. How long did the boat remain at floater-trap No. 4 at that time?

A. Oh, I judge 30 or 40 minutes, something like that.

Q. When it left there, which way did it go?

A. It went towards Hawk Inlet.

Q. Was it light enough for you to see the boat

(Testimony of Herman Mitts.)

at that time? A. No.

Q. It wasn't? A. I couldn't see no boat.

Q. You were not at this camp on the 29th of June? A. No, sir.

Mr. SMISER.—Take the witness.

Cross-examination.

(By Mr. RODEN.)

Q. You say you got up about 5 o'clock on the 8th?

A. Yes, between 4 and 5, sometime.

Q. How did you happen to get up that early in the morning?

A. The night watchman come and called, "Swan Swanson"—that is what woke me up.

Q. Who was the night watchman?

A. His name was Benson.

Q. He called you and you got up?

A. He called "Swanson" and that woke me up, too—I heard him.

Q. You got up, anyhow? A. Yes.

Q. And put on your clothes?

A. Well, no, not exactly right away. [152]

Q. What did you do?

A. I went out and looked—I heard them say something about the boat was coming down.

Q. So you went out and looked?

A. I looked out through the door.

Q. Where did you see the boat when you went out and looked?

A. It was just coming around the No. 1 trap—it wasn't quite around the trap yet when I seen it.

(Testimony of Herman Mitts.)

Q. It wasn't around the trap yet? A. No.

Q. And you watched her go towards Hawk Inlet?

A. I didn't get you.

Q. I say, you watched the boat then going down towards Hawk Inlet? A. Yes.

Q. How far off the traps was she then, about?

A. Well, the Bay trap—I guess she must have been, oh, 500 or 600 feet out from the Bay trap, anyhow.

Q. 500 or 600 feet out from the Bay trap, and she was headed for the point there to go around to Hawk Inlet, was she?

A. She went pretty close to the floating-trap.

Q. The lead to the floating-trap sticks out pretty well, doesn't it?

A. It sticks out a little further than the Bay trap.

Q. So to get to the point she would necessarily have to come closer to the floating-trap than the other trap, wouldn't she?

A. Well, it wasn't exactly necessary to go that close.

Q. Just answer the question. If she kept on a straight course from where you saw her heading for the point she would necessarily come closer to the floating-trap than to any of the other traps, wouldn't she? A. Yes, she would.

Q. That is the time you heard the shooting?

A. No, not before she got to the point at Hawk Inlet.

Q. When she got around the point at Hawk Inlet

(Testimony of Herman Mitts.)

you heard the shooting? A. Yes. [153]

Q. Then you noticed her coming back again?

A. Yes.

Q. Where was she when you saw her coming back?

A. When I saw her again—when I got out and looked she was, as I said, about a thousand feet from the floating-trap.

Q. That is when you saw her coming back again?

A. Yes, the first time.

Q. Did you see her coming back from that direction the second time? A. The second time?

Q. Yes.

A. No, that was the first time that I saw her.

Q. You say when you saw her coming back the first time it was then within a thousand feet of the floating-trap—how close was she to the floating-trap when you saw her come back the second time?

A. I didn't see her the second time.

Q. Then she was one thousand feet off the floating-trap when you saw her come back?

A. Just about.

Q. That is the first time you noticed her coming back? A. Yes.

Q. How much time elapsed between the time you saw her first visit the Bay trap to the time you saw her coming back, opposite the floating-trap?

A. Well, she must be away 30 or 40 minutes, something like that.

(Testimony of Herman Mitts.)

Q. Where were you when you saw her come back and visit the floating-trap?

A. I was in the cabin.

Q. Had you remained in the cabin all this time?

A. Yes, sir.

Q. Had you been on the lookout for her?

A. No, I was pretty much—I started to put my clothes on after she quit shooting around the point.

Q. Were you alone in the cabin at that time?

A. No. [154]

Q. During this interval—I mean this 30 or 40 minutes?

A. No, there were five of us in that cabin, I think.

Q. What were you doing at the time you saw her coming back and visit the floating-trap?

A. I don't get you.

Q. I say what were you doing from the time you saw her come back to the time you saw her visit the floating-trap?

A. I got—after she come back and the shooting began, I got out behind the logs—behind them.

Q. As soon as you saw her come back you went outside, did you? A. Yes.

Q. Was she shooting then?

A. Yes, they were shooting.

Q. They were shooting when you saw her at the floating-trap? A. Yes.

Q. That was the first shooting you saw her do, was it?

A. They were doing some shooting around the

(Testimony of Herman Mitts.)

point there at Hawk Inlet.

Q. Yes, but you didn't see the boat then when that shooting was going on, did you?

A. I just heard that.

Q. So the first shooting that you heard and saw both was when she was visiting the floating-trap?

A. Yes.

Q. And as soon as you heard that you went outside and went in behind something? A. Yes.

Q. You say you went behind some logs?

A. Yes.

Q. Where were those logs?

A. We had them piled up in front of the cabin.

Q. You sat behind there, I suppose, until the shooting was over?

A. Yes, just about. [155]

Q. What was the closest that the boat ever came to you on that morning?

A. Well, when she was straight out from the cabin—I guess it would be a couple of thousand feet.

Q. Now, whereabouts was she when she turned out to sea?

A. When she left and turned out to sea she was something—she was up to the Bay trap there.

Q. She was close to the Bay trap—how far from the face of the Bay trap?

A. Well, I couldn't say exactly how close she was to the trap.

Q. Well, your best opinion?

(Testimony of Herman Mitts.)

A. I would say between 300, 500 or a thousand feet.

Q. 500 to 1,000 feet—that is when she was doing the last firing? A. Yes.

Q. You couldn't see the name of the boat that time, could you? A. No, sir.

Q. Until you saw her here in town—when was that?

A. I seen her three weeks after that happened.

Q. Was that about the time you came in here to be present at the preliminary hearing downstairs?

A. Yes, I think it was.

Q. That is the time you saw her?

A. That is the time I saw her.

Q. How did you happen to see her at that time?

A. I was down to the City float.

Q. Were you all alone when you saw her there?

A. No, there was—I don't remember whether there was three or four of us.

Q. Three or four of you, cannery boys or trap watchmen?

A. Yes, some of them was those people.

Q. Was anybody else with you?

A. I don't remember who was along.

Q. How did you happen to go down to the City float to look at the boat? [156]

A. We just took a walk down there, I guess.

Q. Just by accident or did you go down on purpose to see if you could recognize the boat?

A. I guess we went down to see if we could recognize it.

(Testimony of Herman Mitts.)

Q. You went down to see if you could recognize it—did the game warden go with you at that time?

A. I don't remember if he was with us or who it was—somebody was with us.

Q. Then you recognized it, did you?

A. I won't say I recognized it but she looks pretty much like her.

Q. Then you recognized it because it looked pretty much like it. Now, then, we will go to the 5th of July. This happened about what time on the 5th?

A. Oh, this was something like one o'clock in the morning.

Q. It was the morning of the 5th? A. Yes.

Q. And it was dark then? A. Yes.

Q. What was the first that you knew about this boat coming?

A. Why, I heard some engine outside.

Q. You were in the cabin at the time, I suppose?

A. That woke me up.

Q. The engine woke you up? A. Yes.

Q. And you got up, did you? A. Yes.

Q. And went outside?

A. I woke up the rest of the boys in the cabin—I woke up Swanson first, I think it was.

Q. You woke them all up, did you?

A. I woke Swanson up first, I think.

Q. You woke Swanson up? A. Yes.

Q. Then Swanson got up and you got up and you went outside, I suppose? [157]

A. No, I didn't go outside.

(Testimony of Herman Mitts.)

Q. Then you stayed in the house?

A. Stayed in the cabin.

Q. Did you at any time during this occasion, when this boat was out there, did you go outside of the house? A. That night?

Q. Yes. A. Yes.

Q. When?

A. After they started to shoot I went out.

Q. After they started shooting?

A. Yes.

Q. Where were they when they started shooting?

A. Well, this boat was—if she wasn't tied up the floating-trap, it was pretty close to it—of course it was dark but I know she was close to it.

Q. How far were you from the floating-trap, then?

A. Well, that is between three and four thousand feet.

Q. About 4,000 feet—did you know what the boat was shooting at? A. No, I didn't.

Q. How many shots did you hear on that occasion?

A. Oh, there was a bunch of shots fired.

Q. How many?

A. There was quite a few—40 or 50 shots, I guess.

Q. Did you say 40 or 50—I couldn't catch you?

A. Yes—something like that.

Q. About how long did they stay around the floating-trap then?

A. Well, I couldn't say for sure—30 or 40 min-

(Testimony of Herman Mitts.)

utes—might have been an hour.

Q. What happened then?

A. Well, when they left they pulled out towards this Hawk Inlet trap.

Q. They pulled out towards the Hawk Inlet trap, and when did you see them last? [158]

A. I didn't see them—I saw the—

Q. You just saw them when they pulled out from there with the boat, I suppose?

A. I couldn't exactly see them—I saw the light sometimes, and sometimes I didn't see the light.

Q. Did they have any lights on the boat?

A. Sometimes I saw lights and sometimes I didn't.

Q. I mean on the 5th? A. Yes.

Q. You watched them pretty closely while they were there the night of the 5th, didn't you?

A. Well, yes, in a way.

Q. Well, you knew as soon as you could find out, what was going on out there, didn't you?

A. Well, I didn't know what was going on except—

Q. You saw the boat, you heard the engine—the engine woke you up? A. Yes, sir.

Q. And you got up and you stayed up until the boat left there? A. Yes.

Q. And the only reason why you got up was on account of the boat coming in there?

A. Yes.

Q. Sure—and as soon as the boat was gone, I suppose you went back to bed? A. Yes.

(Testimony of Herman Mitts.)

Q. And you observed the boat as well as you could all the time she was out there? A. Yes.

Q. And you heard her come, and as near as you could tell she either tied up to the floating-trap or she was pretty close to the floating-trap?

A. Yes.

Q. And then you saw her go towards the Hawk Inlet trap, and that [159] is the last you know of her whereabouts that day—that is about it, isn't it?

A. There was some more shooting going on after she got around that point.

Q. That is the point at Hawk Inlet?

A. Yes, sir.

Q. About how many shots do you think you heard around there?

A. I would say 30 or 40 shots.

Mr. SMISER.—I would like to ask the witness what date he is speaking of.

A. July 5th, I understand.

Mr. RODEN.—That is all.

Redirect Examination.

(By Mr. SMISER.)

Q. You stated that on the 8th you saw the boat come in and go around the Hawk Inlet point?

A. Yes.

Q. And you heard some shooting around there?

A. Yes.

Q. And you saw a boat come back, and then there was the shooting that you described?

(Testimony of Herman Mitts.)

A. Yes, then the shooting begun again afterwards.

Q. Now, on the 5th, that was about one or two in the morning—the night of the 5th, was it?

A. Yes.

Q. And you say the boat was tied up at the floater-trap?

A. Yes, either tied up or pretty close—it was dark and I couldn't see.

Q. But you heard this shooting you have described? A. Yes.

Q. And you men ran out in the woods and heard the bullets hit the limbs, etc?

A. Yes, sir. [160]

Q. Now, when the boat left there did I understand you to say it went back to Hawk Inlet?

A. It went around the point of Hawk Inlet.

Q. And you heard shooting around there that night? A. Yes.

Q. Did it come back any more to your camp?

A. No, I couldn't hear any more after they got through there.

Mr. SMISER.—That is all.

(Witness excused.)

Testimony of Carl Peterson, for the Government.

CARL PETERSON, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

(Testimony of Carl Peterson.)

Direct Examination.

(By Mr. SMISER.)

Q. What is your name? A. Carl Peterson.

Q. Where were you working during the month of July, 1919?

A. Working for P. E. Harris and Company at Hawk Inlet.

Q. What were you doing?

A. I was watching a trap.

Q. How far is the trap that you were watching from Admiralty Cove?

A. A couple of miles.

Q. Were you there on July 5th? A. Yes.

Q. And July 8th? A. Yes.

Q. I will ask you if you were awakened that morning at any time. A. What?

Q. Were you awakened that morning of July 8th by any noise? A. Yes.

Q. What sort of a noise? [161]

A. There was some shooting going on.

Q. Where was the shooting from there?

A. Out from the bay—from the water.

Q. Did you look out—see anything out there?

A. After I got out from the shack.

Q. What did you see?

A. There was a boat laying outside.

Q. And before you left the shack did you hear any shots striking around?

A. Yes, I heard a few shots bumping against the shack.

Q. Did any of the bullets come in the shack?

(Testimony of Carl Peterson.)

A. Yes, three bullets come in the shack.

Q. If this was the shack, this square piece of paper here represents the way the shack was situated, where were you sleeping?

A. I was sleeping up in that end.

Q. Which way was your bed, this way or this way? A. This way.

Q. Was your head this way, or your feet?

A. This way.

Q. Where did these bullets pass with reference to where you were sleeping?

A. Oh, three or four inches from alongside of me.

Q. Where did they land?

A. Two of them sitting in the hind part of the shack, and one was laying on the floor.

Q. Were you in bed at the time? A. Yes.

Q. Did you hear bullets pass you? A. Yes.

Q. What did you do then?

A. I took my gun and went outside.

Q. Where did you go?

A. I fired a few shots when I went down on the beach. [162]

Q. How many? A. About 13, I guess.

Q. You fired 13 shots?

A. Yes—I couldn't reach them—they was too far.

Q. Where did you go when you got on the outside? A. Behind the rock.

Q. I will ask you whether the boat fired any after you got on the outside. A. Fired 2 shots.

Q. Did you hear those bullets? A. Yes.

(Testimony of Carl Peterson.)

Q. How close did they come to you?

A. They wasn't very far away.

Q. After you got behind the rock did you do any shooting? A. Yes—fired two or three shots.

Q. You fired how many?

A. I fired 13 shots altogether that morning.

Q. What did this boat do after this shooting?

A. Left.

Q. Where did it go?

A. Went up to Admiralty Cove—in that way.

Q. And could you recognize the boat? A. No.

Q. What time in the morning was this?

A. About 5 o'clock.

Q. About 5 o'clock? A. Yes.

Q. Now, after the boat passed around the point toward Admiralty Cove, I will ask you whether you heard any other shooting around there.

A. Yes, I thought I heard a couple of shots,—I was up in the shack.

Q. You went back in the shack?

A. Yes. [163]

Q. And you thought you heard a couple of shots?

A. Yes.

Mr. SMISER.—Take the witness.

Cross-examination.

(By Mr. RODEN.)

Q. You think you heard about two shots, after the boat left your place? A. Yes.

Q. Did you stay up that morning, or did you go back to bed? A. I stayed up.

(Testimony of Carl Peterson.)

Q. And how far out would you say the boat was when you last saw her?

A. About 400 yards.

Q. And you couldn't recognize the boat?

A. What?

Q. You couldn't see what boat it was? A. No.

Mr. RODEN.—That is all.

(Witness excused.)

Testimony of John Hanson, for the Government.

JOHN HANSON, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. SMISER.)

Q. What is your name? A. John Hanson.

Q. Where do you live?

A. My home is in Washington, Whatcom county.

Q. Where were you employed during June and July of 1919? A. In July?

Q. June and July? [164]

A. In June I was up here working in Icy Straits, Strawberry Point.

Q. What company were you working for?

A. Pacific American Fisheries.

Q. What were you doing?

A. Taking charge of a trap up there.

Q. Watching a trap? A. Yes, sir.

Q. At Strawberry Point? A. Yes, sir.

Q. Was there anyone else there with you?

(Testimony of John Hanson.)

A. Yes; there was two men—another fellow by the name of Lee.

Q. Who was the other—you say there were two men?

A. Yes; there was another man besides me.

Q. You didn't mean there were two besides yourself? A. Only one besides myself.

Q. Were you watching this trap on the 30th day of June? A. Yes, sir.

Q. I will ask you if anything occurred on the night of the 30th of June there at your trap?

A. Yes.

Q. What occurred?

Mr. HUBBARD.—Now, if the Court please, we desire to put in our objections to the testimony of this witness.

The COURT.—What is the objection?

Mr. HUBBARD.—The evidence is not admissible. It is a transaction that occurred on the 30th day of June at a point a long distance from where the transaction took place which we are trying. It is not in any way connected with the case which is on trial, and there is nothing that connects it up in any way with that transaction. The evidence is inadmissible—it is incompetent, irrelevant and immaterial as to this case, and has a tendency to prejudice the minds of the jury.

The COURT.—I think, Mr. Smiser, that I indicated what my ruling is on these matters. If you can connect this boat with any [165] similar offenses—holding up traps—it would be evidence of

intent and purpose, but if this witness' testimony is not any more connecting than the last witness' testimony—

Mr. SMISER.—Well, it is.

The COURT.—I would have sustained an objection to the last witness' testimony—I would have stricken it out if the motion had been made because that witness could not identify the boat and he did not identify any men that were on it. Unless this witness can identify the boat, or identify the men, or connect it in some other way, the objection will be well taken.

Mr. SMISER.—I think it will be fully identified, your Honor.

The COURT.—Very well, I will admit it subject to a motion to strike it when the testimony is finished.

Mr. HUBBARD.—We understand that as far as the testimony of the last witness is concerned it is subject to your Honor's ruling that if it isn't connected the motion to strike will be sustained. It might still be connected by other witnesses—it is true that this last witness did not identify it—it might be connected by some other witness, but if it is not we propose when the Government has its case in to make our motion.

The COURT.—I think the last witness' testimony ought to be stricken because it was not connected.

Mr. SMISER.—The witness testifies to certain facts, your Honor, that are testified to by some other witnesses.

The COURT.—If that witness or any other witness is willing or able to swear that on that occasion this boat did the work, that would be a connection.

Mr. SMISER.—That is just what several witnesses did—Henry Alexander for one, Andrew Abrahamson for another, Swanson for another.

The COURT.—Yes, but they swore about July 8th.

Mr. SMISER.—The last witness swore about July 8th. He testified about July 8th. [166]

The COURT.—Yes, but he did not testify that the same boat was there on July 5th, and the other witnesses did. He did not connect it in any way whatsoever. It is only inferentially that one could come to the conclusion that the last witness is talking about the same occurrence that the other witnesses are talking about—I cannot tell—

Mr. SMISER.—Cannot tell except the fact that the boat came there and tied up to floater-trap No. 4 about one o'clock the night of the 5th and did some shooting at the camp and took the course that was described by the other witnesses—he tells us all the details that the other witnesses have detailed, but he does not recognize the boat—Henry Alexander testified about that—he was out there on the water when the boat came in there.

The COURT.—How do you know that Henry Alexander was talking about the same occurrence that the last witness was talking about?

Mr. SMISER.—Because it was the same boat, at the same time and at the same place.

Mr. HUBBARD.—More than two miles away.

Mr. SMISER.—I think it is fully connected, your Honor.

The COURT.—I do not think the last witness' testimony has been connected at all.

Mr. SMISER.—If your Honor please, he certainly testified as to the 8th.

The COURT.—I mean as to the 5th.

Mr. SMISER.—But as to the 5th, he testifies to all that the other witnesses testified to except the fact that he could not recognize the boat because it was dark and he could not see it.

The COURT.—That being the case, how do you know, or how do the jury know, or how does anybody else know that he is talking about the same occurrence the other witnesses are talking about?

Mr. SMISER.—Because it happened at the hour and the place that they detailed.

The COURT.—The hour is indefinite—he says about—about is an [167] indefinite time—one cannot tell—there might have been another boat that came in there shooting.

Mr. SMISER.—He made it as definite as it seems to me a man could make a thing.

The COURT.—You would have to jump at a conclusion that the last witness was talking about the same occurrence that the other witnesses were talking about.

Mr. SMISER.—Shall I proceed?

The COURT.—Yes, if you connect it up.

Q. Mr. Hanson, you say that on the 30th of June,

(Testimony of John Hanson.)

1919, you were at this trap that you were watching?

A. Yes.

Q. I will ask you if any boat came into that trap on that date?

A. Yes, came a boat in there in the evening of the 30th of June.

Q. What time in the evening?

A. About, well, half-past eight—about that time.

Q. Where were you when the boat came in there?

A. I was on the floating scow I lived on—had a house there.

Q. On the floating scow? A. Yes.

Q. What did the boat do when it came in there?

A. He tied up to the trap.

Q. Then what did you do?

Mr. HUBBARD.—I understood the witness to say a cannery boat came in at half-past eight.

The WITNESS.—I didn't say cannery boat. There came a boat in the evening up to the trap and tied up.

Q. (By Mr. SMISER.) Now, tell what you did when this boat came in and tied up to that trap.

A. Well, I went out outside of the house where we lived and took a look at it.

Q. Well, you took a look, and then what did you do?

A. And soon after I went in the dory and started to pull over.

Q. Went in the what? [168]

A. In the dory.

Q. And went to pull out where?

(Testimony of John Hanson.)

A. Went to pull over to the trap.

Q. Go ahead and tell what happened.

A. Well, I came something about halfway and I heard the noise of a bullet some place near by me.

Mr. HUBBARD.—If the Court please, it seems to me that before the witness testifies to any more detail he should be asked whether he recognized that boat or recognized the parties on it.

Mr. SMISER.—I will ask that at the proper time.

The COURT.—I have indicated what the ruling will be—if it is not connected it will be stricken.

Mr. HUBBARD.—If the Court please, the witness has testified that he saw a boat. Now, he knows whether or not he recognized that boat, and if he knows that boat, or if he saw any of the parties there he can testify that he recognized them. If he did the testimony might go in, but to put in a lot of detail here of something that transpired there before it is identified to the jury—

The COURT.—If he does not identify the boat it does not hurt you in any way whatsoever. How can it hurt you?

Mr. HUBBARD.—I do not know that it would, if the Court please.

The COURT.—If he does not know anything about what boat it was, or cannot identify the boat or the parties on it, it does not hurt you; consequently let counsel develop his case the way he wants to, then if it is not connected it will be stricken out. I cannot direct him as to what order

(Testimony of John Hanson.)

he shall put his testimony in.

Mr. HUBBARD.—I am inclined to think, if your Honor please, that testimony of this kind does have a tendency to hurt, even if it is afterwards stricken out. We will save an exception to the testimony.

The COURT.—Proceed.

Q. (By Mr. SMISER.) Well, you heard the noise of a bullet— [169] did you hear the gun fired? A. Yes, I heard a gun fired.

Q. Then what did you do?

A. I stopped pulling then.

Q. Now, go on and tell what happened.

A. The fellow up on the trap spoke to me and says, “You better go back to that old scow and stay,” he says, “and behave yourself or I will plug you,” or “throw you overboard” or “put you down to the bottom,” or something like that.

Q. What did you do then?

A. I turned back to the camp where I came from—where I live.

Q. How many shots did you hear up to that time?

A. I didn’t count the shots really then but afterwards I thought about eight shots in all was fired around there at that time.

Q. Well, now, you went back to your scow?

A. Yes.

Q. What did you do then?

A. Well, my partner come out, and he went in the boat with me and we both pulled out then.

Q. He got in the boat with you and you both pulled out then?

(Testimony of John Hanson.)

A. Yes, the same way again—over to the trap.

Q. Did you get out to the trap?

A. No, we didn't.

Q. How far did you get?

A. We came about halfway.

Q. What occurred, if anything?

A. Came bullets then also—shooting then, and I saw a bullet then went right by my oars and fell down in the water.

Q. You saw the bullet striking on the water near your oars? A. Yes, sir.

Q. What did you do then?

A. Well, we stopped pulling then, and we say to each other, "We won't take any chances," and we went back again. [170]

Q. You went back to your scow?

A. To the scow where we lived.

Q. Now, how many men did you see on the trap at that time? A. We saw three men.

Q. Did you notice the size of these men—did you take note of the size?

A. That man that handled the gun seems to me to be the size man probably like somewhere around 6 feet—something like that.

Q. How did his size compare with the defendant, Al Weathers?

A. I couldn't say—I wasn't near enough for to see him—I wouldn't know him by face at all.

Q. Not knowing him by face, but how did his size compare with Al Weathers' size?

A. All I can say about his size is the fact that the

(Testimony of John Hanson.)

nearest I can judge it is something about six feet—that is all I can say about the size of the man who was handling the gun at that time—as close as I can judge or that I could judge at that time.

Q. What were the sizes of the other two men?

A. I didn't see them very good—they was walking around there—working—it seems to me they were smaller size.

Q. Smaller size than the first man? A. Yes.

Q. Were the other two about the same size, or did they differ in size?

A. The other two, you mean?

Q. Yes.

A. I couldn't say that—I couldn't say the difference of them other two men.

Q. Now, I will ask you if you saw that boat that they tied up to that trap at that time—did you see the boat? A. I saw the boat, yes.

Q. Do you know what boat that was?

A. No, not at that time. [171]

Q. Well, did you afterwards in any way find out what it was?

A. Well, they took us into town here and we found a boat by the dock down here on Front Street that seemed to be like it.

Q. I will ask you whether or not you recognized it as the same boat?

Mr. HUBBARD.—Now, if the Court please, I think I will object to the testimony. The witness has stated that he did not recognize the boat at that time.

(Testimony of John Hanson.)

The COURT.—I know, Mr. Hubbard, but you might see a thing at one time and then see it at another time and know it was the same thing.

Mr. HUBBARD.—He might come to the conclusion that the boat he saw several weeks later was the same boat, but his testimony is being admitted on the ground that he identify the boat.

The COURT.—He does not have to identify it at that time.

Mr. HUBBARD.—We will save an exception to the testimony on that ground, if the Court please, and on the further ground that the boat at the time it was recognized as he said was in the hands of the United States Marshal and had been illegally seized by the United States Marshal.

The COURT.—What effect would that have?

Mr. HUBBARD.—I simply want to save the exception.

The COURT.—Very well.

Q. (By Mr. SMISER.) I will ask you whether or not you recognized it as the same boat, speaking of the time you came into Juneau here and saw the boat “Diana”—I ask you if you recognized it as the same boat that was out at your trap on the 30th of June?

A. I would say it looks like that boat.

Q. Now, at the time you saw the boat at Juneau were there any other boats around except that, or was that the only one there?

A. Around our trap?

Q. No, was there any other boat, when you went

(Testimony of John Hanson.)

to look at the boat at Juneau, the boat that you said looked like the one that was at your trap, were there any other boats around the dock at [172] that time, or only the boat you were looking at?

A. No, I couldn't see any other looks like that boat—that was the nearest I could see around there.

Q. Were there any other boats that did not look like it?

Mr. HUBBARD.—Let me understand. He said, “Yes, it looked the nearest like that of any” he saw.

Mr. SMISER.—Suppose he did say it—what of it?

Mr. HUBBARD.—I want to understand what he said.

The COURT.—Yes, that is what he said.

Q. Now, were there any other boats there when you were looking at it to find out what boat it was—were there any other boats around there?

A. Yes, there was—there was many boats around.

Q. Now, I want to ask you about the shots that were fired when you were getting out of your wangan and going towards the trap where the boat was located—could you tell where these shots were coming from?

Mr. HUBBARD.—Now, if the Court please, I will move at this point to strike out the testimony of this witness on the ground that he has not identified the boat, and on the further ground that at the time the boat was tied up at the dock testified to and about which questions were asked, she had

(Testimony of John Hanson.)

been seized by the United States Marshal and was in the hands of the United States Marshal and cannot be used as evidence against the defendant here.

The COURT.—I cannot see what difference it would make whose hands it was in—whether it had been seized or not. If the witness recognized the boat it would not make any difference.

Mr. HUBBARD.—I think there are decisions holding that where property of the defendant has been seized it is not to be used as evidence against him.

The COURT.—Is it being used as evidence against him? Nobody has brought the boat in here as evidence.

Mr. HUBBARD.—I reserve an exception to the Court's ruling.

The COURT.—The statute gives you an exception. I think, Mr. [173] Smiser, if that is as far as this witness can go, that it looked nearer like it than any other boat that he saw, that it is not sufficiently connected.

Q. (By Mr. SMISER.) Please make it as plain as you can whether this in your opinion was the same boat that was at your trap on the 30th of June.

Mr. HUBBARD.—If the Court please, I think I will object to that—the witness has testified.

The COURT.—Overruled.

A. I say it looks like it, the nearest I could see of all them boats around—the shape of the boat and the mast, and it looked almost the same.

(Testimony of John Hanson.)

Q. Can you state whether in your opinion it was the same boat or not?

Mr. HUBBARD.—Now, if the Court please, I will object to that question. The witness has stated that it looked like it, and it was the nearest of any boat there like it.

The WITNESS.—I couldn't swear to it it was the same boat.

Mr. HUBBARD.—Now he is asking him to give an opinion about it and he has stated the facts.

The COURT.—The last part of your objection is well taken—the first part is not. He cannot give his opinion—he can give his judgment.

Q. Now, I will ask this question—I know that you cannot swear positively that it was the same boat, but please state whether or not in your judgment it was the same boat.

A. It was—yes, it was, in my judgment.

Mr. HUBBARD.—We save an exception to that. The witness has stated that he could not swear to it, and it isn't now a question of his judgment and it isn't a question of his opinion.

The COURT.—Well, I am rather inclined to think that is well taken. He has testified that it looks like the boat but he couldn't swear to it. Now, that can go to the jury for what it is worth.
[174]

Q. Now, I will ask you, Mr. Hanson, whether you could tell at the time you heard these shots being fired from what direction they were coming?

(Testimony of John Hanson.)

A. Well, they came from the trap so far as we could judge it.

Q. It came from the trap?

A. From the trap; yes.

Q. Was that the trap where the boat was?

A. Yes, sir.

Mr. HUBBARD.—If the Court please, I do not like to keep interrupting all the time, but I object to it because it is immaterial. He has said that he could not identify this boat.

The COURT.—He has identified it in a way, and I said it can go to the jury for what it is worth. I shall instruct the jury what all of this evidence is admitted for—I can cover it by my instructions, I think. The objection is overruled.

Mr. SMISER.—Take the witness.

Cross-examination.

(By Mr. HUBBARD.)

Q. How far was the boat away from you?

The COURT.—At which time?

Mr. HUBBARD.—He said he saw a boat at the trap—I want to get the distance he was from the trap.

A. I was about a thousand feet.

Q. How far is your wangan from the trap?

A. 2,000 feet.

Q. When you started out, had the boat tied up to the trap at that time? A. Low tide.

Q. I didn't ask you about the tide, but I will ask you now and we will go back to it—what was the tide? A. The tide was flooding.

(Testimony of John Hanson.)

Q. What?

A. I don't understand you—how you mean.

Q. Do you know whether it was a low or high tide at the time? [175]

A. It was about half low tide at the time, as I remember.

Q. Half low? A. Half low.

Q. Medium tide? A. Medium tide.

Q. Don't you know it was low tide out there?

A. I couldn't remember exactly how it was—I don't think it was exactly low—it was about half tide—something about half tide.

Q. What time of the day was it, did you say?

A. It was half-past eight in the evening.

Q. The boat was at the trap when you first saw it, was it?

A. Oh, no, I saw it before it arrived.

Q. Saw it before it arrived at the trap? A. Yes.

Q. When it went to the trap on which side of the trap did it go to?

A. It landed on the port side of the trap.

Q. That would be on the opposite side from where you were? A. Facing the outside water; yes.

Q. From where you were—you would have to see the boat through the trap?

A. Well, it was laying slanting that way; yes, a little.

Q. What part of it could you see, now, from your wangan?

A. Well, we couldn't see very good after they had landed at the trap, no—all I saw, of course, was some

(Testimony of John Hanson.)

of the boat between the piles, but you couldn't see it clear.

Q. You were looking at the boat through the piling of the trap, John?

A. No, I saw the boat before it landed at the trap also.

Q. I understand, but after it was at the trap all you could see was through the trap?

A. Oh, I could see very good—see the mast and a little boom on the mast.

Q. You couldn't see the hull of the boat?

A. I could see it but not plainly.

Q. Then you say when you started out to the boat you came out [176] about a thousand feet before you came back? A. About halfway.

Q. And you were about 2,000 feet from the boat when it tied up there? A. When it tied up there?

Q. You were 2,000 feet away? A. Yes.

Q. And you say there was another man there?

A. With me; yes.

Q. Where was he?

A. He was in the house—we were both in the house in the beginning.

Q. You were both in the house in the beginning?

A. Yes.

Q. Did you see it through the window first?

A. Saw it through the window.

Q. Which way was it coming from?

A. Well, it was coming from the south like, or something that direction—south like—that way like—I couldn't exactly give you the point,—Point Adol-

(Testimony of John Hanson.)

phus is a point out in the water—that is the point it came almost straight into our trap.

Q. How is the water out there at this trap that you watched—what kind of water it is?

A. What kind of water?

Q. Yes.

A. It is part of Icy Straits.

Q. It is sort of a glacial water there, isn't it?

A. Yes.

Q. It is colored? A. Oh, no.

Q. It isn't clear water?

Mr. SMISER.—I object to this as immaterial and not cross-examination.

The WITNESS.—A lot of ice drifting around there also.

Q. But the water, you say, is discolored from this glacial slit?

A. I couldn't say much about that, Judge. [177]

Q. When had you been to the trap prior to the boat coming there? A. What?

Q. How long before the boat came there had you been out to the trap?

A. Oh, about four hours or a little better, from that time I left the trap until the boat came.

Q. Had the cannery tender been there that day?

A. It was there in the morning also.

Q. What time?

A. Early in the morning, around 8 o'clock or half-past eight—somewhere around there—it was early in the morning.

Q. How long did it stay there?

(Testimony of John Hanson.)

A. He didn't say long.

Q. Why?

A. He fished the trap—took out all the fish there was in the morning and went away.

Mr. HUBBARD.—That is all.

Redirect Examination.

(By Mr. SMISER.)

Q. Mr. Hanson, were there any fish in the trap at the time this boat came up there?

Mr. SMISER.—If your Honor please, I forgot to ask a question or two of this witness.

A. Yes, there was.

Q. What time had you seen the trap last before the boat came up?

A. We were over to the trap about 4 o'clock in the afternoon.

Q. How many fish would you estimate were in the trap at that time?

A. Well, I estimate there was about 200 fish at that time.

Q. I will ask you whether or not this boat lifted the trap on that occasion?

The COURT.—What do you mean by lifted—do you mean robbed the trap?

Mr. SMISER.—Yes, sir.

The COURT.—To lift the trap would be to take the fish out. That would be a perfectly legitimate proposition,—to lift a trap is one thing—to rob a trap is another thing. [178]

Q. I will ask you whether or not this boat robbed the trap on that occasion?

(Testimony of John Hanson.)

A. Why, yes, they took out them fish there was.

Mr. SMISER.—They took out the fish. That is all.

Recross-examination.

(By Mr. HUBBARD.)

Q. How long after the boat went away did you go out to the trap—how long was it before you went out?

A. Not very long—something about 10 minutes—10 or 15 minutes.

Q. That would be about what time?

A. Well,—I don't understand you.

Q. You say you went out in about 10 or 15 minutes after the boat went away? A. Yes.

Q. When did the boat go away?

A. Well, the boat was around there something about an hour.

Q. You fix the time the boat was there about an hour? A. Yes.

Q. And you went out 10 minutes afterwards and you looked in the trap, did you? A. Yes.

Q. Could you see anything?

A. There was no fish.

Q. The water was muddy, was it?

A. No more than ordinary—I couldn't say about that part—I didn't pay any attention to that exactly—most of the time the water used to be pretty clear around there.

Q. The trap was an open trap at the time the boat went there? A. She was fishing.

Q. She was fishing—her tunnels were open?

A. Her tunnels were open.

(Testimony of John Hanson.)

Q. How large was that tunnel?

A. I suppose something about 8 inches—8 or 10 inches.

Q. You think the tunnel is about 8 or 10 inches wide? [179]

A. About—the last tunnel.

Q. Isn't it more than that?

A. Not the last tunnel; no.

Q. How long is it, up and down?

A. It is 20 feet.

Q. It is 20 feet up and down?

A. Yes, 20 feet up and down.

Q. There was nothing to prevent any fish that were in there going out through that tunnel if they wanted to? A. They couldn't go out on that tide.

Q. The tide was running the wrong way for the fish to get out? A. The right way for the fish to get in.

Q. The right way for the fish to get in but not so that they could go out?

A. It was running right for the fish to get in—the tunnels are here, the fish go through, the tide comes this way, then the fish goes up on the tide, up to the side of the pot.

Q. Was this tide coming up against the tunnel?

A. It was running against the tunnel also, yes.

Q. Now, why wouldn't fish inside of the trap swim against that current?

A. He don't turn on that tide—starts up on the tide always coming in.

Q. After he has gone up as far as he can go don't he turn around and go up against the tide?

(Testimony of John Hanson.)

A. He stands up against the tide.

Mr. HUBBARD.—He stands up against the tide, and the trap was open. That is all.

Redirect Examination.

(By Mr. SMISER.)

Q. You say the tunnel was about 8 or 10 inches wide? A. 8 to 10 inches.

Q. Which end of the tunnel do you speak of, the inside or the outside of the tunnel—the mouth or the end of it? [180]

A. It is the mouth of the tunnel is 8 to 10 inches wide—it is the mouth of the tunnel, and back they are about 10 feet wide.

Q. Is that the entrance?

A. You know they shape one tunnel.

Q. Where does the fish go in when it enters the tunnel—where does it enter—what do you call that where the fish go into the tunnel, and how wide was it there?

A. They are about 8 or 10 feet—it is a little different according to the pens.

Q. It is 8 or 10 feet where they go in?

A. They can go 8 feet and they can be 10 feet.

Q. And then at the other end where they go into the pot you say it is 8 or 10 inches?

A. Eight or 10 inches in the mouth.

Mr. SMISER.—That is all.

(Questions by the COURT.)

Q. When the fish passes through the tunnel what does he enter—into what?

A. The tunnel, into the spiller.

(Testimony of John Hanson.)

Q. Is, or is not, the fish caught then?

A. They are caught; yes—it is the last tunnel.

The COURT.—Very well.

(Questions by Mr. HUBBARD.)

Q. You say a fish is caught and cannot get out of the spiller?

A. He couldn't get out on that tide; no.

Q. But they can get out if the tide is proper?

A. When the tide was turned the other way they was apt to get out, some of them.

Q. Some of them could go out?

A. If the tide came the other way.

Q. So they really are not absolutely caught when they are in the trap, because the tide may change and they may go the other way?

A. In such a case we generally close the tunnel.
[181]

Mr. HUBBARD.—Oh, yes, but we are talking about an open tunnel. After you close it it is another matter. That is all. If the Court please, I suppose we should renew our objection and motion that this testimony be stricken on the ground that he did not identify the boat.

The COURT.—Overruled.

(Witness excused.)

Mr. SMISER.—If the Court please, there was a little misunderstanding between the Court and myself as to which witness was being discussed when your Honor said the witness had not identified the boat. I understood it was Herman Mitts but your Honor

(Testimony of Carl Peterson.)

was referring to Carl Peterson. I want to recall Mr. Peterson and ask him one or two questions.

The COURT.—Very well.

**Testimony of Carl Peterson, for the Government
(Recalled).**

CARL PETERSON, upon being recalled as a witness on behalf of the Government, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. SMISER.)

Q. Mr. Peterson, in your examination in chief this morning you stated that you were the watchman on one of the Hawk Inlet traps around the point from Admiralty Cove, on the 8th of July last, did you not?

Q. And you further stated that about 5 o'clock in the morning a boat came in there, around that point, and did some shooting, is that right? A. Yes.

Q. Now, I want to ask you if any other boat besides the one that you testified to came in there that morning? [182] A. No.

Q. Was that the only boat that did any shooting there that morning? A. Yes.

Q. The one you testified about, about 5 o'clock?
A. Yes.

Mr. SMISER.—That is all.

Mr. HUBBARD.—No questions.

The COURT.—Were you there all the night—were you there all the time? A. Yes.

(Witness excused.)

Testimony of Homer Lee, for the Government.

HOMER LEE, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. SMISER.)

Q. Please state your name. A. Homer Lee.

Q. Where were you employed during June and July of 1919?

A. At the Pacific American Fisheries.

Q. At what point were they located?

A. Strawberry Point.

Q. What were you doing at that point?

A. Trap watchman.

Q. Was there any other trap watchman located there with you? A. Yes.

Q. Who was that? A. Jack Ferguson.

Q. Was he with your company—the same company? A. Oh, the same company.

Q. Yes. A. John Hanson. [183]

Q. Where did you live there at that point—in what place? A. I lived in a cabin—shack or cabin.

Q. Where is that cabin located?

A. It was located a little ways from the trap.

Q. About how far from the trap?

A. About 2,000 feet.

Q. Is it on the shore or is it floating?

A. Floating.

Q. Now, you spoke of Ferguson being a watchman out there—who was he watching for?

(Testimony of Homer Lee.)

A. The Astoria and Puget Sound Company, I think it was.

Q. Now, where did he live?

A. He lived on the next float to us.

Q. About how far is his trap from your trap, if you know?

A. I never give that a very close estimation so I couldn't tell you so very close, but I think it was somewhere around 2,500 feet—I couldn't say.

Q. What did he sleep in out there—where did he sleep? A. He slept right on the trap.

Q. Was there a house or wangan built up on the trap?

A. There was a house—a shack there.

Q. Were you in that wangan on the evening of June 30, 1919—were you in your wangan?

A. Yes, sir.

Mr. HUBBARD.—I object to that as leading, if the Court please,

The COURT.—Overruled.

Q. Now, I will ask you if any boat came into this trap that you were watching on that date?

A. Yes, sir.

Q. What time in the day or night?

A. It was somewheres around 8 o'clock in the evening.

Q. When did you find out about it being there?

A. After it had got to the trap.

Q. What did Mr. Hanson do, if anything, at the time the boat arrived [184] at the trap?

A. He went in the dory and started out towards the trap.

(Testimony of Homer Lee.)

Q. Did you hear any shooting while he was going out in that direction? A. Yes.

Q. How many shots?

A. Three that I remember of.

Q. What did Mr. Hanson do after you heard these shots—did you see Mr. Hanson any more?

A. I saw him; yes.

Q. Where was he?

A. He was just about halfway between the wangan and the spiller.

Q. After these shots were fired what did he do?

A. Came back to me.

Q. Did he say anything to you?

Mr. HUBBARD.—I object, if the Court please.

The COURT.—Sustained.

Q. What did he do after these shots were fired?

A. Who—Mr. Hanson?

Q. Hanson.

A. He came back to me in the wangan.

Q. Then what was done?

A. I went in the dory with him.

Q. Where did you go?

A. We started out towards the trap again.

Q. What happened, if anything?

A. Began shooting again.

Q. Who did? A. The fellows on the trap.

Q. Did you see any people on the trap?

A. When I got outside I seen three—when I first got outside.

Q. Can you give a description of those men?

A. No, I cannot—I don't remember.

(Testimony of Homer Lee.)

Q. Did you go out to the trap? [185] A. No.

Q. How far did you go?

A. Just about halfway again—just about halfways between.

Q. Did you hear anything said at any time by the men on the trap? A. When I was in the dory?

Q. At any time while they were there?

A. Yes, I heard them say, "Go back to the scow."

Q. Did they say anything else?

A. He says some more but not that I could—I couldn't make out what he was saying.

Q. Now, you were going out with Mr. Hanson and you got out halfway and you heard some shots—did you hear any bullets? A. Yes.

Q. Where were they with reference to you—where were they passing?

A. There was only one that I could say distinctly where it passed—that passed back of me.

Q. Only one? A. Yes.

Q. Did you notice any striking in the water around? A. Yes.

Q. Where were they striking?

A. They were striking a little ways from the boat—to the side of the boat.

Q. Then you and Mr. Hanson turned around and went back? A. Yes.

Q. I will ask you what these men did down at the trap after that—what did they do?

A. They lifted the trap.

Q. You mean by that robbed the trap? A. Yes.

(Testimony of Homer Lee.)

Q. Do you know whether there were any fish in the trap or not? A. Yes.

Q. How many fish in it?

A. The last time I lifted the trap, I guess there would be around [186] 200 fish.

Q. What time was that?

A. That was the latter part of the afternoon—around about 5 o'clock.

Q. Around about 5 o'clock that same evening?

A. Yes.

Q. After you went back to the cabin what did the boat proceed to do—what did this boat down at the trap do after you went back to the cabin, you and Mr. Hanson?

A. She laid there for some time.

Q. What were they doing?

A. She was lifting the trap.

Q. After they lifted the trap what did they do?

A. She pulled away—pulled out in the Straits.

Q. Did you see the boat? A. Yes.

Q. Did you know what boat it was?

A. I seen one that looked very much like it.

Q. What boat was that that you saw that looked like it? A. "Diana."

Q. Where did you see the "Diana"?

A. Down at the dock here.

Q. What time was it that you saw it at the dock here in Juneau?

A. The 27th of July, I believe it was.

Q. When you saw it there did anybody point it out to you, or did you find it yourself?

(Testimony of Homer Lee.)

A. I saw it myself.

Q. I will ask you whether you recognized it as the same boat or not.

A. Yes, I recognized it as the same boat—very much the same.

Q. Did you examine the trap after the boat left there on the 30th? A. Yes, sir.

Q. How long after the boat left before you examined the trap—after the boat went away—when did you examine it?

A. Oh, I should judge 10 or 15 minutes, I think.

Q. Were there any fish in it? [187]

A. No.

Q. How were the lines?

A. The lines were practically the same.

Q. No difference in it?

A. Not that I noticed.

(Whereupon court adjourned until 2 o'clock P. M.)

AFTERNOON SESSION.

February 13, 1920, 2 P. M.

HOMER LEE on the witness-stand.

Direct Examination (Cont'd).

(By Mr. SMISER.)

Q. I will ask you whether or not you recognized the boat at the time you saw it at the dock at Juneau as the same boat that visited the trap on the 30th of June. A. Yes.

Q. I will ask you whether anyone pointed it out to you or whether you recognized it yourself.

(Testimony of Homer Lee.)

A. I recognized it myself.

Mr. SMISER.—Take the witness.

Cross-examination.

(By Mr. RODEN.)

Q. How close did you come to the boat, the time you were out to the trap you were watching—what is the closest you ever came to her?

A. About a thousand feet.

Q. And you say that this man Ferguson who was watching another trap—who does the trap belong to, the one he was watching?

A. The Astoria and Puget Sound, I think it was.

Q. That, you think, was 2,500 feet distant?

A. I think so—I couldn't say that for sure because I never gave it a close estimation.

Q. Isn't there another old trap in there, or a part of a trap in there, between your trap and Ferguson's trap? [188] A. No.

Q. There isn't? A. No.

Q. All right. That was on what date, Mr. Lee?

A. The boat was out there?

Q. Yes. A. The 30th of June.

Q. The only thing you could hear them say on the boat was, "Go back to the scow"—that is what he said to your partner Hanson?

A. That is all I heard plain.

Q. Could you understand anything else?

A. No.

Q. Then you saw that boat again, you say, on the 27th day of July? A. Yes, I think it was.

Q. Where did you see it?

(Testimony of Homer Lee.)

A. Down at the dock.

Q. Which dock?

A. Where the boats generally lay—halibut boats.

Q. You mean the City dock or the dock down there by the City float, down by the Standard Oil Company?

A. No, this dock here.

Q. There are a lot of boats there quite often.

A. Where the boats generally lay in here.

Q. Where the big boats come?

A. Alongside of there; yes.

Q. Did you go down there to see if you could recognize her?

A. No, I came in on the cannery tender.

Q. You came in on the cannery tender and you tied up alongside of her, or close to her, did you?

A. Yes, sir.

Q. Then you knew her?

A. Yes, sir.

Q. Can you swear positively that that is the same boat?

A. Well, no, I couldn't swear to it; no.

Mr. RODEN.—That is all.

(Witness excused.) [189]

Mr. HUBBARD.—I think we better interpose our objection here, that this witness' testimony should be stricken. He says the last thing that he couldn't swear to it positively.

The COURT.—It will go to the jury for what it is worth, as identification.

Testimony of J. H. Ferguson, for the Government.

J. H. FERGUSON, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. SMISER.)

Q. State your name.

A. John Henry Ferguson.

Q. Where were you employed during the months of June and July, 1919?

A. I was employed out at Strawberry Point.

Q. What company were you working for?

A. The Astoria and Puget Sound Packing Company.

Q. What were you doing?

A. Trap watchman.

Q. Where did you live at that point?

A. On the trap.

Q. What is there to live in?

A. There is a little house—7x8—something like that.

Q. Where is it located?

A. Right over the spiller.

Q. Do you know where a trap belonging to another company is situated near there? A. Yes.

Q. That was watched by Mr. Hanson and Homer Lee? A. Pacific American Fisheries?

Q. Pacific American Fisheries' trap—how far is your trap situated from their trap?

(Testimony of J. H. Ferguson.)

A. Well, I should judge about 1,800 feet—not over 2,000 feet—something like that—1,800 to 2,000 feet. [190]

Q. Which side of the trap is this house situated on with reference to where their trap is located?

A. My house is right out on the water—right out on the outside edge of the trap—right in line with their spiller.

Q. I will ask you if you were at that point on the evening of June 30, 1919.

A. I was on the trap; yes, sir.

Q. I will ask you if you saw a boat come in and approach the trap watched by Mr. Hanson.

A. Yes, sir, I did.

Q. Which way did it come from?

A. It came from the way of Hoonah.

Q. How would that be with reference to where you were and the other trap—how would its course be, I mean?

A. I do not *just* exactly what the course would be.

Q. Will you please place these papers somewhat in the position or as nearly in the position as you can, of your trap and their trap?

A. There is the position of my trap that I was watching, you see, and here is the position of the trap that those boys was watching.

Q. Where is your house on that trap?

A. My house is right here, on the outside edge of the water, the deep water, and their house is right here.

(Testimony of J. H. Ferguson.)

Q. Where was the boat when you first saw it?

A. The boat was off in this direction, coming from the way of Hoonah.

Q. In coming that way how near did it come to where you were?

A. It came within about 200 feet of my spiller—somewhere thereabout.

Q. Which way did it go?

A. Swung somewhat, turning off this way.

Q. With reference to the trap that was watched by Hanson, which way did it go? [191]

A. Same direction—this is the trap that was watched by Hanson, it swung port and come this way.

Q. What did it do when it got to that trap?

A. Tied up.

Q. I will ask you if you took any special notice of the boat at the time it was passing the trap.

A. Yes, I did; I was looking at it through the glasses when it passed that distance—somewhere around there—I don't know how close it was but I estimated it at that—I was watching them with the glasses until they came up and made that turn.

Q. I will ask you if you recognized that boat.

A. I did.

Q. What boat was it? A. The "Diana."

Q. I will ask you if you saw any men aboard of it. A. Yes.

Q. Who did you see that you recognized, if any-one?

A. A tall man like Mr. Weathers there, with a

(Testimony of J. H. Ferguson.)

smaller man, came to the aft end of it.

Q. You speak of Mr. Weathers—is that the defendant? A. Yes, sir.

Q. You say you watched through the glasses?

A. Yes, sir.

Q. After they tied the boat to the trap watched by Mr. Hanson what did they do, if anything?

A. One of the men crawled up on the capping and looked around and the other two started to lift the trap.

Q. I will ask you if you saw Mr. Hanson about that time anywhere? A. Yes, sir.

Q. Where did you see him?

A. He was coming in a rowboat from towards them to his wangan that he lived in.

Q. Where was his wangan with reference to these two traps you have placed?

A. Right about there. There was a dolphin off over here, and this [192] wangan which they lived in was moored to that dolphin.

Q. You saw Mr. Hanson, you say, come in a boat, and what did he proceed to do?

A. He started out to the trap.

Q. Which trap?

A. That he was watching—this Pacific American Fisheries' trap.

Q. Was the boat there at that time?

A. Yes, sir.

Q. Did he continue out there until he reached it?

A. No, he was stopped.

Q. How was he stopped?

(Testimony of J. H. Ferguson.)

A. By these young men telling him to go back and shooting at him.

Q. Did you see the shooting? A. Yes, sir.

Q. Hear it? A. Yes, sir.

Q. Did you hear what was said?

A. Yes, sir.

Q. What was said?

A. Well, they told him to go back to that scow and stay there, and then they told him they would leave money on the capping for him, and then that they would put him in the spiller and if he came out any further they would plug him and put him in the bottom.

Q. What did he do after this shooting, and after them telling him this?

A. He went back to the scow he was living on.

Q. Did you see what he did then?

A. No, I didn't—I heard him call to this man that was on the scow with him, Mr. Lee.

Q. You heard him call to Lee? A. Yes.

Q. What did the two do then?

A. Then they came right out to the trap.

Q. Now, tell what transpired. [193]

A. When they got quite a little ways from the scow they fired a shot at them; they kept on coming and he said, "You are as close to this trap as you are going to get," and they fired three shots in succession.

Q. Then what happened?

A. Then the boys went back to the scow.

Q. Then what did this boat do?

(Testimony of J. H. Ferguson.)

A. They proceeded to lift the trap and take the fish.

Q. What did they do after lifting the trap?

A. They set the trap back in fishing shape again, the same as it was when they started on it, and went right away.

Q. Do you know how many fish they took out of the trap?

A. Yes, I have an idea there was about 200.

Q. How did you find out?

A. I had been out over there visiting the boys that afternoon, and I dropped right up to the trap that afternoon as I came back and looked into it.

Q. And did you have occasion to examine the trap after the boat lifted it? A. Yes.

Q. What time did you examine it?

A. About 9:30, I think, in the evening.

Q. Were there any fish in it when you examined it? A. No, no fish.

Q. Were Mr. Hanson and Mr. Lee there?

A. Yes, they were on the trap.

Q. Did you know Al Weathers by sight at that time?

A. Not at that time, I didn't know that he was the man.

Q. When did you see him next?

A. I seen him here in the courtroom.

Q. Did you recognize him as the man?

A. Yes, he looked very much like the man.

Q. To the best of your belief state whether or not he was the man. [194]

(Testimony of J. H. Ferguson.)

A. There is no doubt in my mind but what he is the man.

Q. What was the size of the other two men that were with him?

A. They were a little bit smaller.

Q. Were they about the same size, or was there any difference in them?

A. No, one was very small and the other was halfway between.

Q. Have you seen Ike Weathers and Ernest Stage? A. Yes, sir.

Q. Know them now by sight?

A. By sight; yes, sir.

Q. How does the size of the two compare with the size of the two men you saw with Al Weathers on that occasion? A. Very much the same.

Q. Had this boat ever visited your trap at any other time? A. No, sir.

Mr. SMISER.—Take the witness.

Cross-examination.

(By Mr. HUBBARD.)

Q. I will ask you to look at this photograph and state whether or not that is a photograph of your traps out there—if you recognize it.

A. Not at that time.

Q. Here is a larger photograph; maybe this will be better.

A. Yes, that is very much like my trap, but there is no house on it.

Q. The house had been taken off before that picture was taken? A. Yes.

(Testimony of J. H. Ferguson.)

Q. That is the same trap?

A. That is the same trap.

Q. You see the other trap there? A. Yes.

Q. That is the trap you have been talking about belonging to the American Pacific Fisheries?

A. Yes, sir.

Q. Can you see the wangan from there? [195]

A. No, sir, I cannot.

Q. Now, you say the distance between your trap here and this trap is about 1,800 feet?

A. 1,800 or 2,000—yes, I judge about that.

Q. Isn't there another trap site there where traps are sometimes driven during the season, or have you been there other seasons?

A. No, that is my first season.

Q. You don't know, then, that there is a trap site in there between the two? A. I don't know.

Q. You say the distance from this point to this point is 1,800 feet? A. Yes; 1,800 or 2,000 feet.

Q. You say when the boat came in it came up near your trap and came right in? A. Yes.

Q. And when it got near you it swung and went to the other trap? A. Yes, sir.

Q. You had not seen the boat before that time?

A. No, sir.

Q. You didn't know any of the parties before that time? A. No, sir.

Q. Your identification of the defendant is from the fact that you have seen him since?

A. Oh, no.

Q. How did you do it, then?

(Testimony of J. H. Ferguson.)

A. No, the identification is from the time I saw him on the boat.

Q. I say, you saw him on the boat but you didn't know him? A. No, sir.

Q. He was a stranger to you then?

A. Yes, sir.

Q. You have seen him since? A. Yes.

Q. And you say it looks very much like the same man? A. Yes. [196]

Q. You have seen his size? A. Yes, sir.

Q. What is his size? A. I don't know.

Q. You have seen him here—he is about 6 feet, isn't he? A. Yes.

Q. Is that anything unusual for a man 6 feet tall to be working on these boats?

Mr. SMISER.—I object to that as being argumentative.

Q. (By Mr. HUBBARD.) You have stated to the jury that from your position on your trap here you could see Mr. Hanson and Lee on their wangan? A. I could.

Q. You could? A. Yes, sir.

Q. How far is the wangan beyond their trap?

A. Oh, about, say, 2,000 feet.

Q. Two thousand feet over beyond this trap is their wangan? A. Yes, sir.

Q. And you were standing on this trap here?

A. I was.

Q. So you could not only see those men—in order to see those men and what they were doing you had to look through the other trap?

(Testimony of J. H. Ferguson.)

A. No, sir, I did not.

Q. You had to look through the lead?

A. No, sir, I did not.

Q. You didn't have to look through the lead?

A. No, sir.

Q. You had a clear view from where you stood to their wangan? A. Yes, sir.

Q. According to your statement, the distance from your shack over to where they were was 1,800 and 2,000 feet, 4,000 feet? A. Yes, sir. [197]

Q. And you tell this jury that standing 4,000 feet away you heard the conversation between John Hanson and his partner?

A. No conversation—I heard him say—he was telling him that they were robbing the trap.

Q. You say you heard that 4,000 feet?

A. I did.

Q. You not only heard that but you saw what was going on? A. Yes, sir.

Q. You saw them get into a little boat?

A. Yes, sir.

Q. 4,000 feet away? A. Yes, sir.

Q. And you say you saw them take some fish out of the trap—how did they do it?

A. By power of some kind.

Q. Well, if you saw them couldn't you tell how it was done?

A. Well, I had an idea, yes, sir, how it was done.

Q. It isn't a question of idea—you are testifying to what you saw and heard. A. Yes.

Q. If you could see Hanson over here 2,000 feet

(Testimony of J. H. Ferguson.)

beyond in a little skiff you could certainly see what these men were doing at the trap which was only 1,800 feet from you, couldn't you?

A. No, sir, I couldn't; I wasn't looking through the glasses at the time they were taking the fish out. In fact they were down in the web at the time they were taking the fish out.

Q. All three in the web?

A. I wouldn't say how many.

Q. How do you know they were in the webbing?

A. They got down off the capping.

Q. You heard them talking?

A. While they were on the capping.

Q. You heard them talk—a conversation?

A. Yes, sir. [198]

Q. 1,800 feet away? A. Yes, sir.

Q. That is about six blocks, isn't it?

A. Somewhere thereabouts.

Q. About the distance of six blocks—ordinary town blocks, and you heard that conversation?

A. Yes, sir.

Q. And you tell this jury you heard that conversation? A. I do.

Q. And you not only heard that but you heard the conversation two thousand feet farther away?

A. Yes, sir.

Mr. HUBBARD.—That is all.

Redirect Examination.

(By Mr. SMISER.)

Q. What sort of an evening was it, Mr. Ferguson?

A. It was a very clear, calm evening, with a slight

(Testimony of J. H. Ferguson.)

breeze blowing towards me.

Q. Would that make it easier or harder with that breeze carrying towards you for you to hear?

A. Make it much easier, carrying it towards me, and I have talked to the boys from my trap to their trap.

Q. You say you didn't hear any conversation between Hanson and Lee except you heard Hanson tell him they were robbing the trap? A. Yes, sir.

Q. Didn't hear anything else? A. No.

Q. What sort of a tone did he say that in—Hanson?

A. Seemed to be yelling it as loud as he could.

Mr. SMISER.—That is all.

Recross-examination.

(By Mr. HUBBARD.)

Q. You testified in this case on the preliminary examination, did you? [199]

A. Yes, sir.

Q. Did you testify there that the parties that were taking fish out of that trap had a scow at that time?

A. No.

Q. You didn't? A. I did not; no.

Q. You didn't say there in answer to the question, "How many men were working with this boat"? "A. There were the two men that got down on the scow by this time, and the other shorter man got down in the trap"?

A. No.

Q. You didn't say that?

A. No—they got into a skiff.

(Testimony of J. H. Ferguson.)

Q. I am not asking you what they got into—I am asking you if you did not say just what I have read to you here?

A. No, I did not—no, not that I can remember. I cannot remember of mentioning a scow.

Mr. HUBBARD.—That is all.

Testimony of Arvid Johnson, for the Government.

ARVID JOHNSON, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. SMISER.)

Q. What is your name? A. Arvid Johnson.

Q. Where were you employed during the months of June and July, 1919?

A. At Ground Hog Bay fish-trap.

Q. What company employed you?

A. Deep Sea Salmon Company.

Q. What was your duty there?

A. I was trap watchman. [200]

Q. Was there anybody else situated there with you? A. No, not with me.

Q. Was there any other trapman there near you?

A. Yes.

Q. Who was that? A. Ted Likeness.

Q. What was he doing? A. Watching a trap.

Q. For what company? A. Funter Bay.

Q. I will ask you if you were at this point, Ground Hog Bay, on the 7th day of July, 1919?

(Testimony of Arvid Johnson.)

A. Yes, sir.

Q. I will ask you whether any boat came in there on that occasion? A. Yes, sir.

Q. What time did it come in there, day or night?

A. On the 17th, you say?

Q. On the 7th. A. yes.

Q. Day or night? A. Night.

Q. What time in the night? A. Two o'clock.

Q. Where were you at the time it came in?

A. In bed.

Q. Did you hear it when it came in? A. Yes.

Q. Did you get up? A. Yes.

Q. What did you do?

A. Looked out through the window.

Q. What did you see? A. I saw a boat.

Q. Where was it? [201]

A. Alongside of the trap.

Q. What was it doing?

A. They wasn't doing anything then—they were tied up.

Q. Did you see any men? A. No.

Q. What occurred after that, after you looked out of the window?

A. They hollered to me, "If you stick your head out through the window this time we will blow it off."

Q. Then what did you do?

A. I went back again and closed the window.

Q. What happened then?

A. One fellow stepped on the trap and another one said, "Has he lighted the lamp yet?" And I heard

(Testimony of Arvid Johnson.)

the other fellow say "No," and he said, "Make him do it."

Q. Was anything said to you about lighting the lamp? A. Yes.

Q. What was said?

A. Told me to go ahead and light that lamp.

Q. Did you do it? A. Yes.

Q. Now, you were inside the cabin at that time?

A. Yes.

Q. Then what did you do?

A. Sat down on the bed.

Q. Then what happened?

A. They went ahead and lifted the trap.

Q. How long were they there at that time?

A. Oh, about an hour.

Q. Now, I will ask you if any shots were fired?

A. Yes.

Q. Tell about that.

A. They fired two shots when they came there first.

Q. When they first came there? A. Yes.

Q. Could you tell where those shots went?

A. No. [202]

Q. Did they fire any more?

A. After they were done lifting they fired two or three more; I don't know which.

Q. Could you tell where they hit?

A. They hit the stovepipe on top of the roof.

Q. The stovepipe on top of the roof of the cabin?

A. Yes.

Q. I will ask you if this same boat had visited you at any other time? A. Yes.

(Testimony of Arvid Johnson.)

Q. At that point? A. Yes.

Q. When?

A. The latter part of June or the first part of July—I don't know really what date it was.

Q. Was that day or night? A. Night.

Q. What occurred on that occasion. A. What?

Q. What happened—what did they do?

A. They just walked on the trap and looked the trap over.

Q. Did they approach the cabin at that time?

A. What?

Q. Did they come near the cabin?

A. Yes, not very far away.

Q. How far? A. About 12 feet.

Q. Where were you at that time?

A. In the cabin.

Q. Where in the cabin? A. At the window.

Q. Who came up to within 12 feet of the cabin?

A. Al Weathers.

Q. Anybody with him?

A. Oh, he had a little fellow with him. [203]

Q. What little fellow?

A. I didn't know his name—I didn't know him—a short, little fellow.

Q. Have you seen Ernest Stage here about the courthouse? A. Yes.

Q. How did the size of that fellow compare with Ernest Stage's size?

A. Just about the same size as him.

Q. That was the last of June or the first of July?

A. Yes.

(Testimony of Arvid Johnson.)

Q. Now, when he came up to the window did he say anything to you?

A. I heard him holler, "What are you doing?" he says, and I looked out and he was standing right in front of the window, so he said, "There is no fish in that darned trap there." I said, "No, the company has been lifting them."

Q. Go ahead and tell all that was said.

A. Well, he says, "I suppose the fish are running better inside of two weeks, and we will come around and buy some fish from you."

Q. What time of the day or night was that?

A. About 12 o'clock at night.

Q. Did you see the boat at that time?

A. Yes.

Q. Do you know what boat it was? A. Yes.

Q. What boat was it? A. The "Diana."

Q. Now, at the time they were there on the 7th of July I will ask you whether or not they got any fish out of the trap? A. Yes.

Q. About how many, if you know?

Mr. HUBBARD.—If the Court please, I object to that. It is not material in this case whether they did or did not get fish out of the trap. [204]

The COURT.—Overruled

A. Oh, it was—I don't know for sure—between 1,500 and 2,000 fish, I couldn't say.

Q. They were there, you think, about an hour that time? A. Yes.

Q. Do you know how they got the fish out of the trap? A. Brailed them out.

(Testimony of Arvid Johnson.)

Q. Did you see them brailing them out?

A. No, but I heard it, from the winches going.

Q. Now, had you seen that boat there at any other time? A. I saw it once before.

Q. When was that?

A. I don't know the date it was—it was in June some time.

Q. Where did you see them? A. At the trap.

Q. What were they doing?

A. Lifting the trap.

Q. Some time in June, you say? A. Yes.

Q. Was that night or day? A. Night.

Q. What time? A. Oh, around midnight.

Q. Was there any shooting done on that occasion?

A. No.

Q. Did you see how many men were there?

A. There were three.

Q. Could you tell about what size men they were?

A. No, not for sure.

Q. Well, you couldn't tell for sure, but could you tell whether they were the same size or not?

A. It was dark, but they were the same size men I see here. Q. Same size as what men?

A. Al Weathers, Ike Weathers and Ernest Stage—about the same [205] size—I don't know—I couldn't say for sure.

Q. Did you hear they talk any at that time?

A. No.

Q. I will ask you if the time you heard them talking on the 7th of July, when they told you about lighting the lamp, and not to come out, etc., if you

(Testimony of Arvid Johnson.)

recognized the voice of anyone?

A. I thought it was the same voice that I heard there before.

Q. What do you mean by before—what time?

A. Around the last part of June.

Q. Or the first of July, the way you put it at first?

A. Yes.

Q. You mean it was the same as the man who talked to you through the window and you talked to through the window later?

A. I think it was the same voice, and it sounded like it.

Q. You thought it was the same voice? A. Yes.

Q. Now, you thought you recognized it as whose voice?

A. Al Weathers'—I couldn't say for sure, but that is the way it sounded to me.

Mr. SMISER.—Take the witness.

Cross-examination.

(By Mr. HUBBARD.)

Q. What was the last time you say they were there? A. 7th of July.

Q. 7th of July, the last time? A. Yes.

Q. At 2 o'clock in the night of the 7th? A. Yes.

Q. That was after midnight? A. Yes.

Q. You had gone to bed? A. Yes.

Q. Were you asleep when they came up?

A. Yes. [206]

Q. What woke you up then?

A. They hollered to me.

Q. They called you up? A. Yes.

(Testimony of Arvid Johnson.)

Q. Didn't they shoot before they called you up?

A. No, they hollered to me, "If you stick your head out through the window we will blow it off."

Q. You were not sticking your head out through the window, were you?

A. No, but they told be if I should do it they would.

Q. You hadn't at that time put your head out, had you? A. No.

Q. If you had stayed in bed they would not have shouted out?

Mr. SMISER.—We object to that question. He don't know what they would have done.

Q. That was on the 7th, you say?

A. Yes.

Q. How long did they remain there?

A. About an hour.

Q. Then they left there about 3 o'clock in the morning of the 8th? A. Yes.

Q. Now, how do you fix that time of 3 o'clock on the morning of the 8th that they left there—did you have a watch? A. Yes.

Q. Did you look at it? A. Yes.

Q. Did you go out to see the trap after they had gone away? A. Yes.

Q. How many fish were in there?

A. None that I could see.

Q. Couldn't see any? A. No.

Q. It was dark, wasn't it? A. Yes. [207]

Q. You couldn't have seen them if there had been fish in there, could you? A. Yes.

Q. You could? A. Yes.

(Testimony of Arvid Johnson.)

Q. At night? A. Yes.

Q. How was the tide—was it low tide or high tide there? A. I don't know.

Q. This is a floating-trap? A. Yes.

Q. Well, then, it goes up and down with the tide, doesn't it? A. Yes.

Q. So it doesn't matter about the tide on a floater? A. No.

Q. How deep is the spiller on these traps?

A. About 32 feet.

Q. And the water stands how high on the trap, on a floating-trap such as you have there?

A. Half the log is sticking up.

Q. The water comes up halfway up on the trap; is that the idea? A. On the logs.

Q. How much water would be in the trap there—how deep would the water be—that is, inside of the spiller, we are talking about—how much water was there in there?

A. Oh, there would be about 34 feet—34 or 35 feet.

Q. And you say you could see if there were any fish in that trap? A. Yes.

Q. You could?

A. There wasn't no fish there.

Q. Wasn't any fish—you didn't see any?

A. No.

Q. If the fish were in the trap you could see them, you say? A. Sure. [208]

Q. You can see down to the bottom of 30 feet of water, can you? A. No.

(Testimony of Arvid Johnson.)

Q. The trap was open, was it? A. Yes.

Q. It was fishing? A. Yes.

Q. The tunnel of the trap wasn't closed when they came there? A. No.

Q. How large a tunnel have they on that trap?

A. I don't know how deep the tunnel is on the trap.

Q. How wide is it?

A. About 8 feet where they go in.

Q. Eight feet where they go in? A. Yes.

Q. How wide is it where it terminates in the spiller? A. Oh, about 8 inches.

Q. About 8 inches there—it was open at the time you were speaking of—at that time the trap was open? A. Yes, she was fishing.

Q. Did you state what time in the month of June you went to watching there?

A. No, I couldn't say for sure—I think it was the 8th, or something.

Q. About the 8th of June?

A. Yes—I don't know for sure—I don't remember.

Q. You stated there was a second or third time the boat was there and got some fish out of the trap—what time was that? A. What time?

Q. The first time you testified to.

A. That was around the middle of the month—I don't know—I had no—

Q. Around the middle of the month—can't you fix the date? A. No, I cannot.

Q. You have testified two or three times in this

(Testimony of Arvid Johnson.)

case, haven't you? A. Yes. [209]

Q. Why didn't you mention that before when you were testifying, that there were fish taken out of that trap the middle of the month?

A. There was only once I testified it was around the 12th, I thought it was.

Q. You didn't testify at any time that there were any fish taken out of your trap around the 12th?

A. That question hasn't been asked me.

Q. Oh, you didn't testify because the question wasn't asked you. When did you tell the District Attorney that there was another occasion besides the one you testified to on the 7th?

A. I told him that the first time I was in here.

Q. You told him that the first time you were in here? A. Yes.

Q. But he didn't ask you anything about it on the other examinations?

A. No, not the last time I was on the stand he didn't.

Q. No, nor the first time either. Did you testify to that on the preliminary examination in this case before Judge Burton? You didn't at that time say anything about there being any fish taken out of your trap about the 12th, did you?

A. Not that I remember.

Q. No, and you didn't at the first trial of Ernest Stage—you didn't say anything about it, did you?

A. No, not the first trial.

Q. And the District Attorney knew it all the time? A. Yes, I think so.

(Testimony of Ted Likeness.)

Mr. HUBBARD.—That is all.

(Witness excused.) [210]

Testimony of Ted Likeness, for the Government.

TED LIKENESS, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. SMISER.)

Q. What is your name?

A. My name is Ted Likeness.

Q. Where were you employed during the months of June and July, 1919?

A. Well, I was employed at the Thlinket Packing Company, Funter Bay.

Q. How far were you situated from the trap where Arvid Johnson was watching at that time?

A. Well, I was, I guess, off about a couple of thousand feet.

Q. Were you there at your trap on July 7th—the night of July 7th? A. Yes, sir.

Q. Where were you at about 2 o'clock that night?

A. I was in bed.

Q. I will ask you whether or not you heard any shooting there in the direction of the trap Arvid Johnson was watching. A. I did.

Q. Did you get up and go out?

A. No, I didn't go out, but I got up.

Q. Did you see anything over there that way to attract your attention? A. No, I didn't; no.

(Testimony of Ted Likeness.)

Q. How far away were you from there?

A. Well, it must be about 2,000 feet or more.

Q. Did you go over the next morning?

A. No, I didn't go over the next morning, but I think I went over the next morning after that.

Q. Now, I will ask you whether you know the boat "Diana"? A. Yes, I do.

Q. Did you know it at that time?

A. Yes. I had seen it before that time—of course I didn't see it exactly that time. [211]

Q. Well, had you ever seen that boat "Diana" at or near your trap?

A. Well, I couldn't say that—I don't know that I did at that time—I seen it before that.

Q. Well, before that, that is what I am talking about. A. Yes, I seen it before that.

Q. How long before?

A. I seen it the 10th of June.

Q. How did you happen to see the boat at that time?

A. Well, the boat come along the traps there, and the watchman who was on the trap before Johnson, why, he seen the boat and he come over to my trap and notified me there was a boat at his trap, and he was anxious to see this boat because they stopped at the trap, and one of them got on the trap.

Q. They got off their boat on to the trap?

A. On the trap; yes.

Q. Which trap is this—I do not understand—your trap or some other trap?

(Testimony of Ted Likeness.)

A. Yes, Ivar Johnson's trap—the Deep Sea trap, and he seemed to be very anxious to see who it was, so he waved at them and made a signal for them to come over, and as they came over along the shore towards my trap, that boat came in alongside the dolphin, near it, so I took the watchman over so he could talk to them.

Q. Did you go on the boat at that time?

A. Yes, I did.

Q. Who was on the "Diana" at that time—what men?

A. Well, I didn't know them at the time—I didn't ask their names, but I recognized the two guys—the third I didn't pay any attention to because he was down in the steamroom.

Q. Which two did you recognize?

A. It was a fellow named Ernest Stage and Al Weathers.

Q. You recognized those two? A. Yes, sir.

Q. That was on the 10th of June?

A. That was on the 10th of June.

Q. I will ask you if you noticed at that time what equipment that [212] boat had, whether it had any equipment for fishing?

Mr. HUBBARD.—If the Court please, I think we will object to that—I do not think that is material.

The COURT.—I think it is unnecessary details—

Mr. SMISER.—All right.

Q. You went on board of her at that time, did you? A. Of what?

(Testimony of Ted Likeness.)

Q. You went on board of the "Diana" at that time? A. Yes, I was aboard, yes.

Q. Talked to these fellows?

A. Talked to the guys; yes.

Q. After this conversation what did the "Diana" do?

A. Well, they left and went right on the way they were heading before they stopped there.

Mr. SMISER.—That is all.

Cross-examination.

(By Mr. HUBBARD.)

Q. Which way was that?

A. That was towards—along the shore there towards Excursion Inlet—in that way—they went out Icy Straits, anyway.

Q. That would be going out Icy Straits way, wouldn't it? A. Yes.

Q. They went right out that way? A. Yes.

Q. There were no fish taken or nothing done that day you are talking about, was there?

A. No, sir.

Q. You just simply saw the boat, and Ivar Johnson hailing the boat? A. Not Ivar.

Q. Who was it that hailed the boat?

A. It was the watchman at the trap before Ivar there.

Q. You called the boys in for some reason?

A. Yes, sir.

Q. And that was on the 10th day of June?

[213] A. Yes, sir.

(Testimony of Ted Likeness.)

Q. How did you fix the date?

A. I mark down every date I want to know particularly about.

Q. And you have a memorandum or writing to that effect, that on the 10th day of June they were up to that trap and you saw them and talked to them? A. Yes, sir.

Q. On that day? A. Yes, sir.

Q. And when they left there that day, the 10th day of June, they went right out Icy Straits?

A. Yes, sir.

Q. What time of day was it?

A. It was in the afternoon—I don't know exactly what time it was—it was in the afternoon.

Q. In the afternoon of the 10th?

A. Yes.

Q. Do you know how long it was after this date you speak of, the 10th, that Ivar Johnson came there to the trap?

A. No, I couldn't say—I couldn't say that.

Q. You say, though, that on the night of the 7th that you heard some shots toward the trap that Ivar was watching? A. Yes, sir.

Q. You were not there and don't know anything about what transpired except as he told you about it thereafter?

A. He didn't tell me about it—I heard them.

Q. You heard two shots? A. Yes.

Q. And then you talked to him about it afterwards, didn't you? A. Oh, yes.

Q. You talked about it, you and Ivar. That was

(Testimony of Ted Likeness.)

about 2 o'clock the morning of the 8th that you heard these shots? A. About that time, yes.

Q. Have you got a memorandum or note by which you can fix that date, too? [214]

A. Yes, I have.

Q. And it was the morning of the 8th?

A. Yes, it was the morning of the 8th.

Q. Two o'clock in the morning? A. Yes.

Mr. HUBBARD.—That is all.

(Witness excused.)

Testimony of M. S. Whittier, for the Government.

M. S. WHITTIER, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. SMISER.)

Q. Please state your name.

A. M. S. Whittier.

Q. Where are you employed?

A. Deputy clerk for the Collector of Customs, Juneau.

Q. Were you so employed during the year 1919?

A. Yes, sir.

Q. I will ask you if you keep a record of the registry of boats? A. I do, sir.

Q. I will ask you if you have a record of the registry of the boat "Diana"? A. We have, sir.

Q. Is that registered in your office?

A. It is, sir.

(Testimony of M. S. Whittier.)

Q. When was it registered there?

A. The vessel arrived from the district of Puget Sound in February, 1919, and in May we issued a permanent document to her in this district.

Q. To whom was this issued?

A. Issued to Alvin Weathers. [215]

Q. Was he the master of the boat then?

A. According to the records.

Q. Did that remain under that registry for some period of time? A. Until September, 1919.

Q. Then the boat was changed?

A. A change in the title.

Q. Do you know the defendant by sight?

A. I do; yes, sir.

Q. Is he Alvin Weathers that registered as captain of this boat? A. Yes.

Mr. SMISER.—That is all.

Mr. HUBBARD.—No questions.

(Witness excused.)

Testimony of W. E. Fielding, for the Government.

W. E. FIELDING, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. SMISER.)

Q. State your name, please.

A. W. E. Fielding.

Q. Where are you employed, Mr. Fielding?

(Testimony of W. E. Fielding.)

A. Standard Oil Company.

Q. Were you so employed during the months of June and July, 1919? A. Yes, sir.

Q. Are you pretty well acquainted with the gas-boats plying between here—

A. Most of them, yes.

Q. I will ask you if you know the gas-boat "Diana"? A. Yes, I know her.

Q. Did you know her during June and July of last year? A. In June—not July.

Q. During the time you knew her who was operating her? [216] A. Al Weathers.

Q. Do you know Ike Weathers?

A. Yes, I know them both.

Q. Do you know whether he operated on the boat during that time?

A. I think both of them were together; I wouldn't say, though—sometimes Al came down alone.

Q. But you did see both of them on the boat?

A. Yes, I saw both of them on the boat.

Q. For what purpose did they come to your place of business? A. For oil.

Q. Came down to the oil dock?

A. To the oil dock for fuel; yes, sir.

Q. I will ask you whether you supplied them oil on different dates during June? A. Yes.

Q. Was that oil charged or paid for at the time it was received? A. It was charged.

Q. To whom was it charged?

A. Charged to the launch "Diana."

Q. Who guaranteed it, if anyone?

(Testimony of W. E. Fielding.)

Mr. RODEN.—We object to the question, who guaranteed the oil bill—what has that to do with the case?

The COURT.—The objection is overruled.

Q. Who guaranteed the payment of it, if anyone?

A. Well, the Northern Packing Company—we charged it to the Northern Packing Company because we originally had it under the Northern Packing Company, the account of the launch “Diana.”

Q. Was that the reason or was there some other reason for not charging it direct to Weathers,—did you have any account with Weathers?

A. Well, when he first came up I understood he owned the boat, but we had no account with him and we charged it to the Northern Packing Company for that reason, so we would be protected if by chance Al Weathers did not pay for it. [217]

Q. Were you authorized by the Northern Packing Company to do it?

A. Not then—not when he first came up, no—when he came up I asked Mr. Estes if it would be all right and he said yes.

Q. You asked Mr. Estes? A. Yes.

Q. He is manager of the Northern Packing Company? A. Yes.

Q. And then when you asked him if it would be all right—

A. Asked him if it would be all right to give them the price which he formerly had.

Q. You ran it under the Northern Packing Com-

(Testimony of W. E. Fielding.)

pany, then? A. Yes, sir.

The COURT.—Who was it that told you to run it under the name of the Northern Packing Company?

A. We had formerly had it under the name of the Northern Packing Company, the launch “Diana,” and when it appeared the next season,—the previous season it was under the Northern Packing Company, but this season, the first time she came up was February or March, I don’t remember, so we run it under the same account as we did the previous year.

The COURT.—Who told you to do it?

A. No one told me at that time—I did it myself.

Q. (By Mr. SMISER.) I understood you to say somebody told you that was all right?

A. Somebody did tell me it was all right, after he come up here—after Estes got up here, as soon as I could get in touch with Mr. Estes I knew the account was O. K. then.

Q. Did you get in touch with him?

A. Yes, I got in touch with him.

Q. And what did he say?

A. He said it was O. K.

Mr. HUBBARD.—It don’t make any difference what Estes said.

The COURT.—What are you trying to show, Mr. Smiser?

Mr. SMISER.—Simply to show that the Northern Packing Company was [218] guaranteeing

(Testimony of W. E. Fielding.)

the oil, the purchase of the oil that was made by the "Diana."

The COURT.—As discrediting Mr. Estes' testimony?

Mr. SMISER.—As going to show his interest. However, it might come more correctly in rebuttal, your Honor—I expect it would on that aspect.

The COURT.—Yes, I think it would be rebuttal because Mr. Estes has not testified in this case, and we do not know anything about the Northern Packing Company.

Mr. SMISER.—I ask then that that part of his testimony as to the payment of the oil be stricken.

The COURT.—Yes, all of that testimony will be withdrawn from the jury.

Mr. SMISER.—The other part of it, I understand, will not be stricken. That is all.

Cross-examination.

(By Mr. RODEN.)

Q. Did you see Al Weathers on the boat "Diana" in the month of June, Mr. Fielding?

A. In June—yes.

Q. Did you ever see Ike on the boat in the month of June?

A. I couldn't say—I wouldn't swear to it, that I saw him. They were both together most of the time, but sometimes Al ran down alone.

Q. That was pretty early in the season, though?

A. That was early in the season.

(Testimony of John Hanson.)

Mr. RODEN.—That is all.

(Witness excused.)

(Whereupon court adjourned until 10 o'clock to-morrow morning.) [219]

MORNING SESSION.

February 14, 1920, 10 A. M.

**Testimony of John Hanson, for the Government
(Recalled).**

JOHN HANSON, recalled on behalf of the Government, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. SMISER.)

Q. Mr. Hanson, in your testimony in chief yesterday you stated that you saw a boat that came to your trap on the 30th day of June, 1919, did you? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. And you say that you saw another boat in Juneau some time after that that you recognized as being the same boat to the best of your knowledge that was at your trap on the 30th of June; is that correct? A. Yes, I did.

Q. What boat was it that you recognized as being the same boat?

A. The name was "Diana" on the boat.

Mr. HUBBARD.—If the Court please, the witness testified to that, and I do not see that there is any necessity for having him repeat it.

(Testimony of A. C. Hanson.)

The COURT.—It will save time to let him answer it.

Q. You say it was the "Diana"?

A. It was the "Diana," the name of it.

Mr. SMISER.—That is all.

Mr. HUBBARD.—No questions.

(Witness excused.) [220]

Testimony of A. C. Hanson, for the Government.

A. C. HANSON, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows.

Direct Examination.

(By Mr. SMISER.)

Q. Please state your name. A. A. C. Hanson.

Q. What is your business, Mr. Hanson?

A. Gas-boat.

Q. What is the name of the boat?

A. I am on the "Tillicum" now.

Q. What were you doing during the spring and summer of 1919? A. I was running the "Dixie."

Q. The gas-boat "Dixie"? A. Yes.

Q. Did you know the Weathers boys at that time?

A. I have seen them, that is all.

Q. Did you know Al Weathers by sight?

A. Yes.

Q. And Ike Weathers? A. Yes.

Q. Did you know Ernest Stage? A. Yes.

Q. Do you know what boat, if any, they were operating during June and July, 1919?

(Testimony of A. C. Hanson.)

A. Well, in June I see them laying down alongside the dock here.

Q. Do you know what boat they were operating?

A. Well, they were on the "Diana."

Q. How many times did you see them?

A. Oh, I don't know—I remember one time they was laying alongside down there.

Q. Do you remember whether they were operating this boat during July? [221]

A. Well, I couldn't say—I didn't see them that I know of—don't remember it.

Q. Do you know who was the master of the "Diana" at the time you saw her?

A. No, I do not know who was master—I suppose Al was, though—I don't know.

Mr. SMISER.—That is all.

Mr. HUBBARD.—No questions.

(Witness excused.)

Testimony of John C. Lund, for the Government.

JOHN C. LUND, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. SMISER.)

Q. State your name, please. A. J. C. Lund.

Q. What business were you engaged in during the year 1919? A. Game warden.

Q. I will ask you whether, during this time, during the spring and summer of 1919, you knew the

(Testimony of John C. Lund.)

defendant Al Weathers A. Yes, sir.

Q. Did you know Ike, his brother? A. Yes.

Q. Know Ernest Stage? A. Yes, sir.

Q. Do you know what they were doing during June and July?

A. Why, they were operating the "Diana."

Q. Is that the gas-boat "Diana"? A. Yes, sir.

Q. Did you see them often during those months?

A. I did, during the month of June.

Q. I will ask you whether or not you were with anyone about the middle of July, on July 17th, when you were out for some [222] purpose of investigation? A. On July 17th?

Q. Yes. A. Yes.

Q. For what purpose were you out at that time?

A. I was looking out for fish pirates.

Q. Where were you on the 17th of July?

A. On a little island outside of Swanson's Harbor.

Q. Do you know what that is called?

A. I don't think it has any name.

Mr. HUBBARD.—I cannot catch the witness' statements for some reason or other.

A. The island has no name.

Q. Can you place it on the chart?

A. Yes, sir—this is the island here we was on.

Q. Where is that island situated?

A. Lynn Canal and Chatham Straits, the junction of them.

Mr. HUBBARD.—Put a cross-mark there so we will know.

(Testimony of John C. Lund.)

Q. Now, what time did you go to that island that day? A. About three o'clock in the morning.

Mr. HUBBARD.—If the Court please, I object to the testimony in reference to that island. There is nothing in this case pertaining to it—we are not charged with taking fish from any place except this place.

The COURT.—I cannot tell yet—it is preliminary to something, I presume.

Q. Was anybody with you at the time?

A. Yes, sir.

Q. Who? A. George Johnson.

Q. How did you get to that island?

A. Why, we went out there in a skiff from Swanson's Harbor.

Q. You and George Johnson went in a skiff from Swanson's Harbor? A. Yes. [223]

Q. What did you do when you got there?

A. We got on the point of the island there.

The COURT.—This is the 17th of July?

Mr. SMISER.—Yes, sir.

The COURT.—This offense is alleged to have been committed on the 8th of July?

Mr. SMISER.—Yes, sir. I want to introduce a fact tending to show that the defendant was engaged in similar operations up to that time.

The COURT.—I never heard of the rule applying to a time after a thing is done, because it would not throw any light on the intent with which the thing that had been done was done.

Mr. SMISER.—My idea is that there was a con-

(Testimony of John C. Lund.)

spiracy between these parties to do these illegal acts and that conspiracy was still active and going on at this date—it was part of the same plan and scheme that had existed for some time—that it had not terminated but was still in existence, and therefore I think it would be competent.

The COURT.—Well, I think it is very doubtful, and I think it would be very unsafe to admit this testimony.

Mr. SMISER.—I would like to reserve the right to recall the witness if the Court should change its opinion before we close our case.

The COURT.—Very well. Of course, I am open to conviction on the subject, but my opinion is that it is not competent.

Q. (By Mr. SMISER.) Now, Mr. Lund, I will ask you if you saw the defendant Al Weathers on the day that he was arrested on this charge?

A. Yes, sir.

Q. Where did you see him?

A. City dock or the City float.

Q. In Juneau? A. In Juneau; yes, sir.

Q. Did you have any conversation with him at that time? [224] A. Yes, sir.

Q. Please state the substance of that conversation.

A. Why, I met him on the dock down there, and he approached me and said, “I suppose all the bulls in town are looking for me,” and I told him I didn’t know whether they were or not.

Q. What did he mean by the bulls?

(Testimony of John C. Lund.)

A. I suppose he meant officers—and he said he wouldn't mind taking a shot at a bull if he was under cover some place.

Q. That was just the day he was arrested?

A. Yes, sir.

Q. Had he been arrested at that time?

A. I don't think so.

Q. Did you have a warrant for him at that time?

A. No, I had no warrant.

Q. Said he would not mind taking a shot at a bull if he was under cover? A. Yes, sir.

Mr. SMISER.—Take the witness.

Cross-examination.

(By Mr. HUBBARD.)

Q. Where did you say this was, this conversation you had with him? A. At the City float.

Q. What were you doing down at the City float?

A. I was waiting to go out on the "Dixie," I believe—waiting for Johnson to come down.

Q. You are game warden for the Territory of Alaska? A. Exactly.

Q. And you spent your time last summer going around on Government boats after pirates?

Mr. SMISER.—I object to that.

The COURT.—I think it is competent cross-examination.

Mr. SMISER.—If your Honor please, it is part of his duties as game warden.

The COURT.—Very well, he can say so, and you can draw it out of [225] him or redirect examination. This is cross-examination now.

(Testimony of John C. Lund.)

The WITNESS.—What was the question?

Q. (By Mr. HUBBARD.) I asked you if you did not spend your time during the months of June and July aboard Government boats, or boats chartered by the Government, out at sea chasing pirates?

A. No, sir.

Q. What time did you spend on them?

A. I spent about 10 days on Government boats, and the rest of the time I was on my own boat.

Q. What is the name of your boat?

A. It has no name.

Q. Is that a Territorial boat?

A. No, it is mine.

Q. Your own individual boat? A. Yes, sir.

Q. Now, during last season what time did you spend in connection with your duties as a Territorial officer,—what days did you devote to your duties as a Territorial officer? A. All the time.

Q. Then you consider when you are out on the sea you are looking after game, is that it?

A. If I am sent out; yes.

Q. When you are sent out? A. Yes, sir.

Q. Were you sent out? A. I was, yes.

Q. By whom?

A. I don't know exactly—I don't know exactly who it was that sent me.

Q. You don't know who it was that sent you, and you have really no idea, either, have you? Why don't you tell the jury who sent you? You know well enough.

(Testimony of John C. Lund.)

A. If you want to know all the circumstances I can tell you. [226]

Q. I think the jury might want to know under what circumstances you were out there.

A. Every officer in town that could get away were out looking for fish pirates.

Q. Why didn't you say so—and you were working under instructions from somebody, weren't you? A. Yes, sir.

Q. And you know who that somebody was?

A. It was the marshal's office, I believe.

Q. Did the marshal's office have authority over you to do these things?

A. They have by consent of the Governor's office.

Q. By having the consent of the Governor's office? A. Yes, sir.

Q. And the Governor advised you that he had given that consent, of course? A. Yes, sir.

Q. So you went out looking after pirates?

A. Yes, sir.

Q. Part of the time you were on the "Dixie," you say?

A. I was out one week one trip,—I was out twice on her.

Q. And part of the time you were out in your own small boat?

A. I wasn't looking for pirates on my own small boat.

Q. Where did you say you met Al Weathers when you met him?

A. On the City dock—that is, the fish float.

(Testimony of John C. Lund.)

Q. What time of day was it?

A. Oh, I would say it was along in the afternoon, about three o'clock.

Q. Of what day? A. The 17th of July.

Q. And you say you had a conversation there with him? A. Yes, sir.

Q. What was it he said to you?

A. Why, he said, "I suppose all the bulls are looking for me." [227]

Q. What did you say?

A. I told him I didn't know.

Q. You knew better than that, didn't you?

A. I didn't know they were looking for him.

Q. Why did you make a misrepresentation of that kind to him?

A. Because I didn't know they were looking for him—I didn't have any warrants or anything for him.

Q. You don't have to have a warrant when you are sent out that way, do you—you didn't carry warrants out when you went on the hunt after pirate boats, did you?

A. Didn't have anybody to have a warrant for at that time—had to find them first and then get a warrant.

Q. That was on the 17th? A. Yes, sir.

Q. About what time of day was it?

A. About three o'clock, I think.

Q. You must be mistaken about that, aren't you, Mr. Lund? Stop and think about that.

A. Possibly I am—it was in the afternoon.

(Testimony of John C. Lund.)

Q. They have an indictment against him on the 17th—he was way out on Admiralty Island taking fish out of a trap, you know that, don't you?

A. I don't know anything about it.

Mr. SMISER.—That is the 17th of June.

Q. (By Mr. SMISER.) When was it you were at this point you designated on this chart?

A. 17th of July.

Q. The same day you had this conversation here in town? A. No, sir.

Q. What day did you have this conversation here in town? A. The 18th.

Mr. HUBBARD.—That is all—there is no use to examine a man who will swear one minute a thing is the 17th, and turn around the next minute and say it is the 18th. [228]

Redirect Examination.

(By Mr. SMISER.)

Q. Now, as to the date you had this conversation with him, you say that was the 18th?

A. I will tell you exactly when it was (referring to memorandum book) that I had the conversation.

Q. Well? A. On the 18th of July.

Q. Have you anything marked in your book there that makes you know that? A. Yes.

Q. What is it?

A. Well, I just got on there "Weathers arrested," that is all.

Q. You know that was the day he was arrested?

A. I know it was the same day.

Q. The day he was arrested?

(Testimony of John C. Lund.)

A. Yes, because I saw Johnson about half an hour afterwards and he told me he just pinched him.

Q. Now, I will ask you if, as game warden, it is a part of your duties to look after fish pirates—violations of the fishing law, etc.? A. Yes, sir.

Mr. SMISER.—That is all.

(Witness excused.)

(Whereupon the jury retired, and Mr. Smiser makes the following offer of the confession of Ernest Stage:)

Mr. SMISER.—If your Honor please, the evidence we want to offer now—I really want to ask Mr. Johnson a question or two about the Weathers boys and Stage operating this boat, and then I want to offer the confession of Ernest Stage, and I want to offer that as evidence against the defendant Al Weathers as the confession of a co-conspirator. I will say to your Honor that the question is quite an intricate one, and one which I am not absolutely free to say is absolutely competent, [229] but I believe there is ground for an argument that it is. I have not been able to prepare a brief on it fully. Mr. Backstrom has worked and got the points in hand better than I have really, but the argument will be that it is a confession made by a co-conspirator during the existence of a conspiracy, and as such it is competent. In the first place those confessions bind co-conspirators where there is a charge of conspiracy, and in this case our position is that it is a conspiracy, although it is

not charged in the indictment, but the fact that it is not charged as a conspiracy in the indictment does not cut any figure—it is not necessary that that be done. We have a very plain decision on that point, that where a man is charged with the commission of a crime—a murder case, for instance—where there is no charge direct of conspiracy, but that if they acted together in the matter that that made them conspirators, and I think beyond a peradventure of a doubt that that feature is in our favor. The law is well settled on that, that it need not be set out in the indictment as a conspiracy. The theory is that the general scheme—and this evidence presents facts which show clearly that they were operating under an agreement or understanding to rob fish-traps generally and that that was in operation at the time of this confession of the conspiracy, and on that ground we believe we perhaps have a right to introduce that as evidence. As I say, I am not absolutely sure I am right, but I want to present it to your Honor and present some authorities to sustain that view of it.

The COURT.—In order to keep the record straight, do I understand the confession you are talking about is the confession that was offered and received in evidence in the trial of Ernest Stage?

Mr. SMISER.—Yes, sir.

The COURT.—Made—

Mr. SMISER.—On the 18th of July.

The COURT.—Made on the 18th of July, 1919?

Mr. SMISER.—Yes, sir; in my office; and also the

confession that [230] he made to George Johnson prior to making one in my office.

The COURT.—How long prior?

Mr. SMISER.—Just the same evening, about half an hour earlier.

The COURT.—What I want to get clearly in the record is that it is confessions made by Ernest Stage on or about the 18th day of July?

Mr. SMISER.—Yes, sir, and sworn to on the 24th day of July. Taken down in shorthand on the 18th.

The COURT.—The point I want the record to show clearly is that it is confessions made after the offense was committed.

Mr. SMISER.—Yes, sir, that is the fact, but as we contend the conspiracy still existed until it was terminated by the defendants, and we will present some law on that feature of it, as to whether it was terminated or not.

The COURT.—I think the point I would like to hear argument on is this, to wit: The rule is that anything said or done by a co-conspirator in furtherance of the conspiracy is admissible, but whether or not a confession is in furtherance of the conspiracy is something I think is very doubtful and upon which I will hear argument.

(Whereupon the jury returned into the courtroom and were excused until Monday morning at 10 o'clock. Thereupon the Court heard argument of counsel on the matter of the admission of the

said confession, and thereafter court adjourned until Monday morning, at 10 o'clock.)

MORNING SESSION.

February 16, 1920, 10 A. M.

(In the absence of the jury.)

The COURT.—Gentlemen, I have considered the matter of this confession and I am satisfied that I should not admit it. It is not an act done in furtherance of the conspiracy—far from it. Three men are indicted jointly for an offense and demand separate trials,—one could absolutely imperil the life or liberty of another by an *ex parte* statement made out of court and without any chance for counsel to cross-examine him or [231] put him on the stand—he cannot be reached. I think it would be fatal error to admit it.

Mr. SMISER.—If your Honor please, for the sake of the record I would like to introduce Miss Liebhart before your Honor, and not before the jury, and formally tender her statement in regard to the fact that it was signed and sworn to by Ernest Stage—for the record and not for the jury.

The COURT.—Certainly.

Testimony of Ina S. Liebhart, for the Government.

INA S. LIEBHART, introduced by the Government, before the Court, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

(Testimony of Ina S. Liebhart.)

Direct Examination.

(By Mr. SMISER.)

Q. Please state your name.

A. Ina S. Liebhart.

Q. What position do you occupy?

A. Clerk to the United States Attorney.

Q. Were you acting in that capacity during July, 1919? A. I was.

Q. I will ask you whether or not you took down a statement of Ernest Stage in shorthand and afterwards transcribed it into type. A. I did.

Q. Do you remember the date of that?

A. It was the 18th, I think, of July.

Q. I now show you a statement and ask you whether or not that is the statement you took down. A. Yes, that is the statement.

Q. How many pages were there in that signed statement? A. There are 17.

Q. I will ask you whether or not Ernest Stage acknowledged and swore to that statement before you.

A. He acknowledged it and swore to it; yes.
[232]

Q. What date was that?

A. That was the 29th. He objected to swearing to it at first, but afterwards he swore to it—no, on the 24th.

Q. What was the objection?

A. He thought you would not use it at the trial, I believe—I think that was it; you asked him to swear to it and he said he would rather not, and

(Testimony of Ina S. Liebhart.)

you said you would like to have him do it, and I think he said he thought you were not going to use it at the trial, and he said he would testify—then I think I went out of the room at that time, and later on you called me in and he swore to it.

Q. I will ask you whether or not you correctly took down in shorthand what purports to be in this deposition. A. Yes.

Q. Whether you correctly and in accordance with the way it was given and taken down in shorthand, transcribed it in type?

A. Yes, with the exception of several sentences that I discovered weren't in the statement, on comparing it on the back page.

Q. Do you remember what they were?

A. They were some sentences about the Weathers boys, whether they were here, and then you and Mr. Johnson started talking to him, and I didn't put that in.

Q. Your notes show what was said, do they?

A. Yes.

Q. I think you better get your notes and read them. (Witness produces notes.) Have you gotten your notes? A. I have; yes, sir.

Q. Now, will you please read what you referred to as being left out,—that you left out?

A. "Mr. Smiser: Well, now, we are going to take steps to break this thing up—we have got—

Q. Do you know where the Weathers boys are now? A. No. Q. Did you quit them? A. Yes, altogether. Q. They are out somewhere? A. They

(Testimony of Ina S. Liebhart.)

are out fishing. Mr. Smiser: Now, we have to keep charge of you on account of the condition of affairs. You will be [233] treated all right, and Mr. Johnson will have to take you under his arrest and I just want you to tell the truth; when you do tell, tell the truth; and we are going to see if we can't break up this trouble. Mr. Johnson here is a writ. (To the witness.) And I will talk with you again some time about it. You will have to be here. We want to get at the bottom—put a stop to this fish robbing. Mr. Johnson: Better explain to him, Mr. Smiser. Mr. Smiser: You are arrested now, charged with—on the smallest offense there because we have got to hold you, and I have just charged you with taking ten dollars' worth of fish from Funter Bay; just done that in order to hold you." That is all.

Q. That was said before or after the deposition?

A. Just afterwards—just at the end of it—I see no break here—just right along.

Mr. SMISER.—That is all.

Cross-examination.

(By Mr. HUBBARD.)

Q. That last statement you read, Miss Liebhart, when was that taken? A. The same time.

Q. You mean the day that the confession was made? A. Yes.

Q. Why didn't you put it in the confession?

A. Mr. Smiser said it was no part of the statement, and I just crossed it out at the time—I crossed it out here—didn't put it in. The question about the

(Testimony of Ina S. Liebhart.)

Wheathers boys I overlooked.

Q. You didn't leave that out intentionally?

A. No, not intentionally, because the statement began, "Well, now, we are going to take steps," and I thought it applied to this whole statement.

Q. He said at the time he had no further connection with the Weathers boys—he said they were out fishing somewhere?

A. "Q. Did you quit them? A. Yes, altogether.

Q. They are [234] out somewhere?

A. They are out fishing."

Mr. HUBBARD.—That is all.

(Witness excused.)

Mr. SMISER.—We will call Mr. Johnson.

The COURT.—I do not know what your object is. You cannot appeal your case and it does not do you any good to make your offer.

Mr. SMISER.—I think if the case were appealed this should be in the record.

The COURT.—I exclude the confession—how can you possibly benefit by it? You are just taking up time.

Mr. SMISER.—All right. I want to examine Mr. Johnson before I close the case.

(Whereupon the jury took their seats in the jury-box.)

Testimony of George L. Johnson, for the Government.

GEORGE L. JOHNSON, called as a witness on behalf of the Government, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. SMISER.)

Q. Please state your name.

A. George L. Johnson.

Q. What official position do you hold?

A. Deputy United States Marshal.

Q. Were you holding this position during the months of June and July, 1919? A. Yes, sir.

Q. Did you make the arrest of Al Weathers?

A. Yes, sir.

Q. In this case? A. Yes, sir.

Q. I will ask you if you, during the months of May, June and July 1919, knew the defendant Al Weathers? A. Yes, sir. [235]

Q. Did you know Ike Weathers, his brother?

A. Yes, sir.

Q. Did you know Ernest Stage? A. Yes, sir.

Q. Do you know what they were doing during these months?

A. Well, they were operating the "Diana"—I seen them on the gas-boat "Diana."

Q. Had you known them for some time, Mr. Johnson?

A. Yes, I have known them for a year or more.

Q. Have you ever been on their boat?

(Testimony of George L. Johnson.)

A. Yes, sir.

Q. Know the boat? A. Yes, sir.

Q. Who was the captain of the boat—master?

A. Al Weathers.

Mr. SMISER.—That is all.

Cross-examination.

(By Mr. HUBBARD.)

Q. You say you knew the boat during what months? A. May, June and July.

Q. Do you know what they were doing with the boat in May? A. In May, no, sir.

Q. Where did you see them?

A. I saw them at Douglas and Juneau.

Q. You mean you saw the men or the boat, or all of them? A. The boat.

Q. You saw the boat there? A. Yes, sir.

Q. Do you know whether they were engaged in halibut fishing during that time?

A. I don't know; no, sir.

Q. During the month of May did you ever see Ike Weathers on that boat? A. Yes, sir. [236]

Q. About what time in May, as near as you can recall?

A. Well, I couldn't say the date. I rode across the channel with him one time in May.

Q. You rode across from here there?

A. No, from Douglas to Juneau.

Q. You say you cannot remember what part of May that was? A. No, sir.

Q. Wasn't it very early in the month of May?

A. I couldn't say.

(Testimony of George L. Johnson.)

Q. In the month of June have you any recollection of having seen Ike Weathers on the "Diana," in the month of June?

A. I seen him here in Juneau on it.

Q. What do you mean, you saw him at the dock on the boat? A. Yes, sir.

Q. But you didn't see him when it was out where he was engaged in fishing, or elsewhere?

A. No, I didn't see him out.

Q. Where was Ike Weathers—you say during the month of June you didn't see Ike Weathers on the "Diana" at any time except down here at the dock?

A. Yes, sir.

Q. Don't you know that during the month of June Ike Weathers was working on another boat entirely?

A. I don't know anything about that—I said I seen him on the boat here at the float.

Q. You don't know anything about that?

A. No, sir.

Q. He wasn't on the boat when you took the boat, was he? A. No, sir.

Q. Working on another boat at the time you arrested him, wasn't he?

A. He was on another boat at the time; yes, sir.

Q. You cannot swear to this jury that during the month of June at any time that Ike Weathers was on the "Diana"?

A. Why, I saw him on the "Diana" during the month of June. [237]

Q. That was down at the dock—the two boats might have been in town together and you might

(Testimony of George L. Johnson.)

have seen him on the boat, but I am talking about being on the boat in the capacity of a part of the crew—did you see Ike Weathers on the boat as a part of the crew?

A. I couldn't say whether he was a part of the crew or not, but he was on the boat.

Q. That is just technically—Mr. Smiser is wanting you to testify that during the months of May, June and July he was engaged in fishing on the “Diana”—that is the point of the evidence. Now, I want to have you state to the jury whether or not during the month of June you can swear that he was at any time on the “Diana” as a part of the crew, for any purpose?

A. I cannot say whether he was part of the crew. The time I rode across from Douglas to Juneau with him, Al was on the boat at that time.

Q. That was some time in May? A. Yes.

Q. You do not try to fix the date, however?

A. I cannot fix the date.

Q. Did I understand you to say it was early in the month of May or the latter part of May?

A. I don't remember whether it was in the early or late in May.

Q. Try to remember. Wasn't it, as a matter of fact, very early in the month of May?

A. I couldn't say.

Q. Did you see other men working on that boat during the months of May and June with Al Weathers—did you know a man by the name of Lynn Durgan? Yes, I know him.

(Testimony of George L. Johnson.)

Q. Do you remember to have seen him on the boat during the month of June? A. No, sir.

Q. You saw the boat during the month of June?

A. Yes, sir. [238]

Q. Where? A. City float.

Q. Did you see it at any other place in town than at the City float? A. No.

Q. Did you know the men you saw around there as part of the crew, or did you simply see them there?

A. I didn' know what their business was or anything about it—I saw them on the boat.

Q. Down at the dock—the fish boats all come in at the same place?

A. I presume near the same place.

Q. That is, the halibut boats?

Mr. SMISER.—I object—that is not cross-examination, to prove that other boats come into the dock at Juneau.

The COURT.—I think it is cross-examination.

Q. I asked you if all of the small fish boats do not land at the same dock down there?

A. Most of them land there.

Q. You desire the jury to understand when you say that you saw him on the boat in the month of June that he was working on the boat, or that he walked about the boat—

A. I don't know about that—I seen him on the boat—that is all I know.

Q. Do you know the crew of the “Diana” during the month of June? I am speaking now outside of Al Weathers—do you know who were the crew dur-

(Testimony of George L. Johnson.)

ing the month of June? A. No.

Q. Do you know during the month of May?

A. Well, as I stated before, I seen Al and Ike on the boat in May.

Q. Yes, I understand—that was some time in May you went across the bay with them to Douglas on the boat, and Al was there on it at that time?

A. Yes, sir.

Q. Now, during the month of July,—when did you see Ike Weathers and Al Weathers on the boat during the month of July? [239]

A. I seen Al on the boat in the month of July.

Q. At what time? A. The 17th of July.

Q. The 17th of July you saw Al Weathers on the “Diana”? A. Yes, sir.

Q. Was Ike Weathers there?

A. I didn’t see him.

Q. Was anybody with Al Weathers at the time?

A. There was somebody with him, but I couldn’t say who it was.

Q. You say you don’t know who it was?

A. No, sir.

Mr. HUBBARD.—That is all.

Redirect Examination.

(By Mr. SMISER.)

Q. Did you see the party so that you could recognize him and know him, that was with Al, or did you just see that there was another man there?

A. There was another man got off the boat and I couldn’t tell just who he was, but he got off the boat and went on the scow.

(Testimony of George L. Johnson.)

Q. What were they doing at that time?

A. They had come in with a load of fish.

Q. Come in where?

A. Where Bennett had his scow out there.

Q. Where was that?

A. It was just this side of Swanson's Harbor, in between one or two little islands—small islands.

Q. What time of the day was it?

A. Between 4 and 5 o'clock in the morning.

Q. Of the 17th of July? A. Yes, sir.

Q. What boat was Al Weathers using at that time?

A. The "Diana."

Q. And you saw another man but couldn't recognize who it was? A. Yes, sir. [240]

Q. Where were the fish that they had,—did they have the fish on the "Diana"?

A. They came into the float there and unloaded fish—I saw them unloading them.

Q. And unloaded them on to Bennett's scow?

A. Yes, sir.

Q. Was Bennett there at that time?

A. Yes, sir.

Mr. HUBBARD.—If the Court please, this is going a long ways in this examination.

The COURT.—Why didn't you object to it?

Mr. HUBBARD.—I thought counsel would only ask a question or two, and we didn't want to be technical about the matter.

Mr. SMISER.—That is all.

(Witness excused.)

Mr. SMISER.—We rest.

PLAINTIFF RESTS.

(Whereupon court adjourned until 2 o'clock P. M.)

AFTERNOON SESSION.

February 16, 1920, 2 P. M.

Mr. HUBBARD.—If the Court please, we submit this motion on the striking out of some testimony in the case: Comes the defendant and respectfully moves the Court to strike from the record herein the testimony of the following named witnesses, to wit:

The testimony of John Hansen and Homer Lee for the reason that neither of said two witnesses identified either the boat "Diana" or the defendant at any time testified to by them or either of them.

All the testimony of Dr. Borland for the reason that said testimony has no bearing upon any of the issues in this case; [241] the same refers to incidents occurring on the 10th day of July, 1919, long after the commission of the offense for which the defendant is now on trial, and does not tend to establish the commission thereof.

That portion of the testimony of Alfred Knutson referring to incidents happening on the 10th day of July, 1919, for the reason that said testimony concerns incidents long after the commission of the offense for which defendant is being tried, and such testimony does not tend to establish the commission of the offense charged in the indictment.

The testimony of Carl Peterson, for the reason that said testimony has not probative force, and does not identify either the defendant or the boat "Diana."

All the testimony given on behalf of the plaintiff with reference to the commission of offenses other than on the 8th day of July, for which latter offense the defendant is now on trial, for the reason that all such evidence and testimony is incompetent and irrelevant and does not tend to establish any of the constitutive elements of the offense charged; that there is no casual or logical or natural connection between the act for which the defendant is now being tried and the acts testified to by said witnesses and attempted to be established by such evidence; that the admission of such evidence compels the defendant to meet charges of which the indictment gives him no notice or information; that it raises a variety of issues and tends to confuse and to divert the attention of the jury from the charge upon which the defendant is being tried and the same does not tend to establish any element of the offense charged.

The COURT.—I think the testimony of Peterson will have to be stricken. I think it would be safer to exclude it for this reason if for no other—the Government asks that it be admitted because other witnesses testified that the “Diana” went in that direction about 5 o’clock; and Peterson testifies that about 5 o’clock a boat appeared,—take note particularly [242] of the word about—about 5 o’clock a boat did appear there and shots were fired. He testified that only one boat appeared there, but the other witnesses did not testify that only one boat passed the point. As Mr. Hubbard said, there might have been two or three boats pass that point that the witnesses never saw—they are testifying as to the

“Diana”—they identified the “Diana,” and they testified that the “Diana” went by there, but they did not testify that no other boat went by there. I think I will grant this motion so far as the testimony of Carl Peterson is concerned; and deny it as to the other witnesses.

Mr. HUBBARD.—We have not named Herman Mitts specially in the motion, to strike out the testimony of the incidents, other than as that of the 8th refers to his testimony.

The COURT.—The motion is too general, in the first place; and in the second place, it is not well taken. Specify the witnesses whose testimony you want stricken out, which you have done, and give me something to go on. I cannot ransack the record to see what every witness has testified to with the view of finding something to strike out. I think the motion is well taken as to Carl Peterson—I have had the testimony read to me.

Mr. HUBBARD.—The Court does not desire to hear anything in reference to Hanson and Lee?

The COURT.—No; I think Hanson is particularly well connected, and Lee also. I may strike Peterson’s testimony out in my instructions to the jury. You need not meet that.

(Whereupon the jury returned to the jury-box.)

DEFENSE.

Testimony of Cash Cole, for Defendant.

CASH COLE, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HUBBARD.)

Q. Will you state your name to the jury?

A. Cash Cole.

Q. Where do you live? A. Juneau.

Q. How long have you resided here?

A. About 22 years.

Q. Engaged in the transportation business, are you? A. Yes, sir.

Q. Do you know the defendant here, Al Weathers?

A. Yes, sir.

Q. How long have you known him?

A. Oh, just in a casual way for about—less than a year.

Q. Did you see him on the 4th of July, 1919?

A. I did.

Q. You may state where is was and about what time in the day.

A. I saw him two or three different times during the day on the 4th, at the barn,—down at the barn.

Q. At your barn where you keep your transportation equipment? A. Yes, stock.

Q. What was the last time—the latest time he was at your place on that occasion?

A. I think it was in the evening.

(Testimony of Cash Cole.)

Q. Can you fix about the time?

A. Well, it was after the hose races, I know. I had gone down there to bed the horses down, and he had been in there then—he had been in once or twice before and wanted to know if somebody had left some stuff in there,—some store was going to [244] leave some stuff in there for him,—that was the first time I had ever spoken to him.

Q. Do you know whether or not the stuff he was expecting came to your place?

A. It didn't come while I was there.

Q. You say this was along in the evening; was it, after dinner or before dinner?

A. It was after the hose races on the 4th of July—somewhere between 7 and 8 o'clock.

Q. In the evening or night of the 4th?

A. Night of the 4th.

Mr. HUBBARD.—That is all.

Cross-examination.

(By Mr. SMISER.)

Q. Do you know that this stuff was to be delivered to his boat there?

A. No; he just asked me if somebody had left some stuff there for him—he said, I think, it was groceries.

Q. Some supplies for his boat?

A. Some supplies.

Q. For his boat?

A. He didn't say—he just asked me if some supplies had been left there.

Q. Did you know where his boat was at that time?

(Testimony of Cash Cole.)

A. No.

Mr. SMISER.—That is all.

Q. (By Mr. HUBBARD.) Where is your stable, or transportation place, barn, with reference to the cannery of the Northern—

A. Right next door.

Mr. HUBBARD.—Right next door to it. That is all.

(Witness excused.) [245]

Testimony of C. F. McNutt, for Defendant.

C. F. McNUTT, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HUBBARD.)

Q. What is your name? A. C. F. McNutt.

Q. What is your business here? A. Teamster.

Q. With whom are you working?

A. Cash Cole.

Q. You are working for Mr. Cole—or are you a partner of his? A. I am working for Mr. Cole.

Q. Were you working under him on the 4th of July last year, 1919? A. I was.

Q. Were you in and about his place, his stable, during the day? A. Yes, sir, most of the day.

Q. Are you acquainted with the defendant here, Al Weathers? A. I am.

Q. I will ask you to state whether or not you saw Al Weathers there at the barn on the 4th of July.

(Testimony of C. F. McNutt.)

A. At least twice and maybe three times that I can recall now.

Q. Was there anyone with him?

A. I saw his brother with him at one time, and another time I believe it was Mr. Bennett with him.

Q. Now, what was the latest time on the 4th—can you fix the last time he was there on that occasion?

A. The last time to my knowledge was some time after the fire truck races on the 4th of July—that must have been around 7 o'clock—I remember it was in the evening.

Q. Did the defendant here come to your barn some time about 7 o'clock, or half-past seven—or after seven?

A. He was there after that time, yes, sir. [246]

Q. Did you have any conversation with him about anything—hear him say anything?

A. Why, yes.

Q. Do you know what his purpose was in coming there?

A. I believe he was coming there looking for some provisions or supplies for his boat that were supposed to come down there.

Q. Where is this place located with reference to the Northern Packing Company?

A. Just this side, on the same side of the street.

Q. On the same side of the street and next door to it? A. Yes, sir.

Mr. HUBBARD.—That is all.

(Testimony of C. F. McNutt.)

Cross-examination.

(By Mr. SMISER.)

Q. Did you know what boat his boat was?

A. How is that?

Q. Did you know Al Weathers' boat?

A. Yes, sir.

Q. What was it? A. The "Diana."

Q. Was he operating the "Diana" at that time—master of it?

A. To the best of my knowledge he was, yes.

Q. Did you see the boat there?

A. Well, now, as to that, I couldn't swear I was out on the face of the dock that day.

Q. But these goods were supposed to be sent there to be delivered to his boat there at that place?

A. That was my understanding; yes, sir.

Q. You say at one time Mr. Bennett was with him?

A. That was along in the afternoon. Whether Mr. Bennett came in the barn or not I don't know, but I know that I saw him in the doorway—it is a big double door.

Q. That was the 4th?

A. Yes, sir; some time in the afternoon of the 4th. What time it [247] was I couldn't say.

Q. He was with Al Weathers at the time?

A. Yes.

Q. You know Mr. Bennett well?

A. Yes, I have known him for the last four or five years.

Mr. SMISER.—That is all.

(Witness excused.)

Testimony of O. E. Bennett, for Defendant.

O. E. BENNETT, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HUBBARD.)

Q. You may state your name. A. O. E. Bennett.

Q. Where do you reside? A. In Douglas.

Q. How long have you lived there?

A. A matter of four years.

Q. Have you lived in Juneau any part of the time, or has your residence been over in Douglas all the time?

A. My residence has been in Douglas practically all the time.

Q. Are you acquainted with the defendant here, Al Weathers? A. I am; yes, sir.

Q. How long have you known him?

A. A matter of four or five years.

Q. Did you know him during the fishing season last year, say, from May to July—May, June and July? A. I did.

Q. Did you see him in and about Juneau and Douglas during that period? A. June and July?

Q. Well, May, June and July—during what you might call the fishing season last year? [248]

A. Yes, sir, the early season I saw him here.

Q. Do you know what he was fishing in the early part of the season? A. Halibut.

(Testimony of O. E. Bennett.)

Q. Do you know where he fitted out his boat for halibut fishing?

Mr. SMISER.—I object to that as immaterial, as to where he fitted out his boat for halibut fishing.

The COURT.—I cannot tell yet whether it is immaterial or not—let him answer.

Q. Did you state that you knew what the boat was doing during the month of May, Mr. Bennett?

A. Yes, sir.

Q. What was it engaged in during the month of May? A. In halibut fishing.

Q. What during the month of June, if you know?

A. Halibut fishing, I believe.

Q. What, if anything, in July?

A. He was engaged in fishing salmon in July, I know.

Q. Now, where were you on or about the 4th day of last year? A. At Whitestone Harbor.

Q. How long had you been there, Mr. Bennett?

A. I think I went out there some time the latter part of June—the last week in June.

Q. Where is Whitestone Harbor with reference to what is called Admiralty Cove, the place testified to here by the witnesses—where is Admiralty Cove, do you know?

A. I am not very familiar with Southeastern Alaskan waters. It is some 20 or 30 miles, I think, from Admiralty Island where I was located.

Mr. HUBBARD.—If the Court please, we will offer in evidence this chart and ask the witness some questions.

(Testimony of O. E. Bennett.)

Mr. SMISER.—No objection.

(Whereupon said chart was received in evidence and marked Defendant's Exhibit No. 1.)

Q. Look at this navigation chart, Mr. Bennett, and point out about [249] where Whitestone Harbor is on that map, and you may make a mark of some kind on it to indicate it.

A. All I know about Whitestone Harbor is it is situated on Chichagoff Island.

Q. What is this point here?

A. That is Pleasant Island there.

Q. No, I am not speaking of the island; I am talking about the water—what is this water here?

A. Icy Straits.

Q. And this water running northward here?

A. Lynn Canal.

Q. What is this up here where the large mark is?

A. Port Frederick.

Q. Do you know where the Hoonah cannery is?

A. Yes, sir.

Q. Where is Whitestone, if you can locate it on there?

A. Whitestone is right in here—it is a little bay in here.

Q. That is Whitestone Harbor in there?

A. Yes, sir.

Q. What is the distance from Whitestone Harbor to Juneau on the course of the small boats?

A. I should judge 60 or 65 miles.

Q. Do they all take the same course in going from Juneau to Whitestone?

(Testimony of O. E. Bennett.)

A. Either around Douglas Island or over the bar.

Q. Can all boats go over the bar?

A. The larger boats do not as a rule.

Q. The larger boats do not as a rule, but some of the smaller boats can get over the bar?

A. Yes, sir.

Q. How much does that shorten the distance?

A. About two hours.

Q. You say you don't know where Admiralty Cove is on this chart?

A. No, I am not familiar with that location.
[250]

Q. You say you went to Whitestone along the latter part of June? A. Yes.

Q. Where were you on the 4th of July?

A. At Whitestone Harbor.

Q. Who, if anyone, was there with you at that time, Mr. Bennett? A. On the 4th?

Q. Yes.

A. There was no one on the 4th.

Q. Had you seen the defendant at Whitestone Harbor just prior to the 4th of July?

A. Yes, sir.

Q. State when. A. I saw him on the 3d.

Q. Where did he go on the 3d of July, if you know? A. Into Juneau.

Q. How, and on what boat, if you remember?

A. On the cannery tender "Agram" belonging to the Northern Packing Company.

Q. Belonging to what company?

A. Belonging to the Northern Packing Company.

(Testimony of O. E. Bennett.)

Q. Where did this boat start from to Juneau on that occasion? A. Whitestone Harbor.

Q. What did you have there in Whitestone Harbor, if anything—have a dock, or what?

A. I had a barge or buying scow.

Q. You had a scow there? A. Yes, sir.

Q. Did the “Agram” when she was in Whitestone Harbor tie up to your scow, or did she have another anchorage place in there?

A. Nearly all of those boats tied up to my scow.

Q. The “Agram” was there on the 3d?

A. Yes, sir.

Q. And when it left there for Juneau who came in or left on that boat for Juneau? [251]

A. The crew of the “Diana” went in.

Q. Who were they?

A. They were three—the two Weathers boys and a boy by the name of Stage.

Q. Ernest Stage? A. Yes, sir.

Q. Do you remember about what time they started in on the 3d?

A. I do not—it was some time in the afternoon of the 3d—afternoon or evening of the 3d.

Q. Where was the boat called the “Diana” at that time? A. It was lying at my float.

Q. You say the defendant here left there on the “Agram”? A. Yes, sir.

Q. When did you next see him, Mr. Bennett?

A. In the early morning hours of the 5th of July, about 5 or 6 o'clock, I should judge—4 or 5 o'clock.

Q. I will ask you to state whether or not he was

(Testimony of O. E. Bennett.)

at Whitestone Harbor during the 4th of July?

A. He was not there during the day of the 4th; no, sir.

Q. Where was the boat "Diana" on the 4th?

A. Tied up at my float.

Q. You said the next time you saw him was the morning of the 5th of July? A. Yes, sir.

Q. 10 or 11 o'clock?

A. 4 or 5 o'clock, when the cannery tender returned.

Q. Where was the boat "Diana" at that time?

A. Lying at the float.

Q. How did he come there on the morning of the 5th? A. On the cannery tender "Agram."

Q. After the cannery tender "Agram" came in there, what, if anything, did it do, if you know—the "Agram," on that day? A. On the 5th?

Q. Yes. [252]

A. Oh, it laid there for a while, and went out looking for fish or seine boats,—I didn't have any fish to sell at that time,—I don't think I had any fish at all on the boat—everybody was in town.

Q. The "Agram" stayed there a while and then went out? A. Yes, sir.

Q. Did it return to Whitestone Harbor again that day or the next day?

A. I think it returned on the 6th.

Q. Then what did it do, if you know?

A. The cannery tender then went into town on the evening of the 6th.

Q. Who left there on the cannery tender at that time, if you have any recollection of it?

(Testimony of O. E. Bennett.)

A. I remember the defendant left on the evening of the 6th.

Q. Who else was there with you at that time after the "Agram" left—who was with you, if anybody?

A. The younger Weathers was there on the evening of the 6th.

Q. Where was the boat "Diana"?

A. At the float.

Q. During the 4th and 5th had the "Diana" been away from the float at your place? A. No, sir.

Q. You say the defendant left there on the 6th, on the "Agram"? A. Yes, sir.

Q. When did you next see him after that?

A. On the return of the cannery tender "Agram" on the morning of the 7th.

Q. On the morning of the 7th? A. Yes, sir.

Q. You say it left there the 6th?

A. Left there the evening of the 6th, or afternoon sometime, of the 6th, and returned the following morning at 4, 5 or 6 o'clock—somewhere around there—that is the time she usually arrived. [253]

Q. Think about that, Mr. Bennett. You say she left the evening of the 6th, and came back on the morning of the 7th?

A. No, sir; she came in on the evening of the 6th.

Q. When did she arrive back to Whitestone Harbor?

A. She returned there the morning of the 7th—if I remember correctly it was the 7th, about 4 or 5 o'clock—it was the first trip after the 4th.

Q. Do you know why the defendant came into

(Testimony of O. E. Bennett.)

town at that time? A. Yes, sir.

Q. What was the reason?

A. I was unable to leave the float, and I expected my wife and her friend from Seattle at that time, and she was due to arrive here about the 7th or 8th.

Q. Did the defendant return to Whitestone Harbor after he came in on that trip?

A. On the evening of the 6th?

Q. Yes. You say he came in on the evening of the 6th, and you say he returned to Whitestone Harbor?

A. He returned to Whitestone Harbor the following evening—leaving here the following evening, arriving out there the morning of the 8th about 6 or 7 or 5 or 6—somewhere in the early morning hours.

Q. Who was with him, if anybody, when he got there at that time?

A. He was alone. His brother was still there.

Q. His brother was where—at Whitestone—while he was in town?

A. Yes, sir, his brother remained there until the morning of the 8th, when Mr. Weathers got back.

Q. What time on the 8th, if at all, did the “Diana,” the boat you have been testifying about—what time did it leave Whitestone Harbor?

A. I couldn’t testify to that—I think it left some time before noon—in the morning.

Q. Who was on the boat at that time, if you know?

A. I think just him and his brother. [254]

(Testimony of O. E. Bennett.)

Q. I will ask you where the boat "Diana" was between 4 and 5 o'clock on the morning of the 8th?

A. The boat "Diana," on the morning of the 8th, was lying at my float.

Q. Where was Ike Weathers at that time?

A. He was there.

Q. He was aboard the "Diana"? A. Yes, sir.

Q. And Al Weathers, you say, the defendant here, arrived out there on the "Agram" on the morning of the 8th, about what time?

A. About 4 or 5 or 6 o'clock—the early morning hours—about the time the cannery tender usually arrived.

Mr. HUBBARD.—That is all.

Cross-examination.

(By Mr. SMISER.)

Q. You say that Al Weathers left the cannery on the 6th? A. No, sir.

Q. Left Whitestone Harbor on the 6th?

A. Yes, sir.

Q. And came to Juneau? A. Yes, sir.

Q. What time did he leave that day?

A. I couldn't tell you, sir—some time in the afternoon or evening of the 6th, when the cannery tender came to town with him aboard.

Q. And you say he returned from town on the morning of the 7th?

A. No, the morning of the 8th.

Q. You first said the morning of the 7th, didn't you? A. No, sir, the morning of the 8th.

Q. You repeated it several times, didn't you, in

(Testimony of O. E. Bennett.)

answer to Mr. Hubbard's question, that he got back the morning of the 7th?

A. He couldn't get back there the morning of the 7th and leave there the evening of the 6th.

Q. I know, but I am asking you didn't you state that he came [255] back on the morning of the 7th, and after Mr. Hubbard asked you some other questions, didn't you change it to the morning of the 8th?

A. No; if I mentioned the morning of the 7th I was mistaken, because he couldn't get back there on the morning of the 7th.

Q. You say he came to town that morning for the purpose of meeting your wife?

A. My wife and her friend, who were due to arrive here about the 7th or 8th.

Q. That friend was a lady who was with your wife? A. Yes, sir.

Q. And they were due to arrive here about the 7th or 8th? A. Yes, sir.

Q. Why was it necessary for him to meet them?

A. I wanted some friend of mine to meet them so my wife could get out on the cannery tender.

Q. Did she get out?

A. She didn't arrive on that steamer, as I expected—I had a wire or a letter that she would not arrive until the following steamer. That is the reason that he came back on the 7th.

Q. And he left on the evening of the 7th and he arrived at Whitestone about 8 or 9 o'clock the morning of the 8th?

(Testimony of O. E. Bennett.)

A. No, I think it was earlier than that.

Q. Didn't you state a little while ago it was 8 or 9 o'clock?

A. I don't think so, because the cannery tender usually got there in the early hours.

Q. But you first said it got there about 7 or 8 o'clock, didn't you?

A. Not that I remember of—if I did I was mistaken in the hours, because it was bound to arrive there earlier than that—she usually left here about 10 or 11 o'clock, and it is 7 or 8 hours running time.

Q. Now, you say it was about 7 or 8 o'clock—

A. No, sir, I didn't say that. [256]

Q. You didn't say that a while ago?

A. Not that I remember of, because I know it was much earlier—4 or 5 o'clock—when she usually arrived there.

Q. That is what you testified in the Ernest Stage case, that this boat got there about 4 or 5 o'clock.

A. The cannery tender usually arrived there about 4 or 5 o'clock in the morning.

Q. Now, I will ask you if you didn't state in your testimony in the Stage case, that Al Weathers returned to Whitestone Harbor the morning of the 8th of the month about 4 o'clock in the morning?

A. I think I did—that is the same time I state that he returned now—4 or 5 o'clock—somewhere along those hours—might have been six o'clock but not later than that.

Q. Now, did he remain at Whitestone Harbor the day of the 8th?

(Testimony of O. E. Bennett.)

A. That I don't remember—the boats were coming and going all the time—I don't remember what time he left there after that. Naturally I would know the time that he returned because I had news and letters from my wife. He returned the morning of the 8th, and she had not arrived yet.

Q. Why didn't Weathers wait for her if he came here to meet her—she arrived on the 9th, didn't she? A. The 9th or 10th, I believe she arrived.

Q. Why didn't Weathers wait here for her until the 8th?

A. I don't know Mr. Weathers' business—I suppose he had his business to attend to.

Q. You sent him on that business, didn't you?

A. I never sent him particularly, only he was coming to town.

Q. Didn't you testify that that is what made him come, that you got him to come to meet your wife—didn't you testify that was the purpose of his coming? A. Yes, sir.

Q. If she came in on the 9th why didn't he wait and meet her?

A. He didn't know what time she would arrive. He had no letter from her—he had letters for me, but he didn't open them [257] to find out what time she was coming, so naturally he didn't know.

Q. When she didn't arrive on the morning of the 8th he went back?

A. He returned on the morning of the 8th, with letters for me.

(Testimony of O. E. Bennett.)

Q. With letters for you?

A. From my wife, yes.

Q. Now, who else was at Whitestone Harbor on the 4th of July besides yourself? A. Nobody.

Q. Weren't you in town that day? A. No, sir.

Q. Didn't you go down with Al Weathers down here to Cash Cole's in the afternoon to see about the delivery of some goods there?

A. On the 4th?

Q. Yes. A. Most emphatically not.

Q. You didn't? A. No, sir.

Q. You are sure of that?

A. I never left the Harbor.

Q. Now, who else was at Whitestone Harbor on the 4th besides you and Ike Weathers?

A. I don't know of any other boats being in there at that time—there might have been one or two boats laying there—I know the younger brother was there while the elder came to town.

Q. Was there anybody else at all there during that time during the absence of Al Weathers, besides yourself and Ike Weathers?

A. I don't remember of anybody else being there—there may have been another boat or two there—I wouldn't say.

Q. What time did the "Diana" leave Whitestone Harbor on the 8th?

A. I couldn't tell you that—I know the elder brother returned on the morning of the 8th on the cannery tender, and as to what future movements they made after that I don't know, because I was

(Testimony of O. E. Bennett.)

interested in my wife's letter—he told me she had not arrived, and what time they left I do not know.
[258]

Q. She arrived on the boat "Jefferson," didn't she? A. I think it was the "Jefferson."

Q. You say you had been up in Icy Straits since about the first of June?

A. No, sir; since the last week in June.

Q. You were buying fish? A. Yes, sir.

Q. Were you buying them on commission?

A. Yes, sir.

Q. And furnishing the fish to the Northern Packing Company? A. Yes, sir.

Q. Did you know the boat "Diana" at that time?

A. Yes, sir, I knew the boat "Diana."

Q. Did you know the "Thalia"?

A. Yes, sir.

Q. Did you know the "Juneau"?

A. Why, I saw the "Juneau," I believe, once at Whitestone Harbor.

Q. Did you know the "May"?

A. No, I don't think I knew the "May"—I have seen the "May."

Q. Did you know the "Pilgrim"?

A. I have seen the "Pilgrim."

Q. What boats did you buy fish from out there?

A. All the seine boats that had any fish to sell.

Q. Well, what are the names of them?

A. I never kept any record of the boats.

Q. Can't you name any of the boats you bought fish from?

(Testimony of O. E. Bennett.)

A. Yes, I can name a number I bought fish from. I bought fish from the "Henrietta," the "Ruth," "Ocean Wave," and other boats with only numbers on that I don't remember their names.

Q. Buy any from the "Diana"?

A. I bought fish from the "Diana."

Q. Why didn't you name that?

A. I can mention the "Diana"—also bought fish from the "Thalia."

Q. Why do you hold those back until the last?
[259]

A. I didn't intend to hold them back—never gave them a thought. You asked me to give you the names and I gave them to you.

Q. I will ask you, Mr. Bennett, if you didn't go out there for the express purpose of buying fish that pirate boats were stealing out of traps?

A. No.

Mr. HUBBARD.—We object to that, if the Court please.

The COURT.—Overruled.

Q. I will ask you if you didn't buy from all of the boats that were commonly called pirate boats—if you didn't buy all the fish that they brought in?

A. How would I know that they were pirate boats?

Q. Don't ask me questions—you answer my questions. A. I didn't know they were pirate boats.

Q. You didn't know that they were pirate boats?

A. I did not.

(Testimony of O. E. Bennett.)

Q. I will ask you if you didn't buy from the "Thalia"?

A. I bought from the "Thalia," yes, sir.

Q. The "Pilgrim"? A. Yes, sir.

Q. The "Diana"? A. Yes, sir.

Q. Didn't you, during all of the time the alleged fish piracy was going on, hear of these reports about fish being stolen out of traps?

A. No, sir; I think I would be the last one to hear about it.

Q. You would be the last man—the one who was getting the proceeds from it would be the last one to hear of it?

A. I suppose I would if that was going on.

Q. Suppose you would if you had a stand in with them.

MR. HUBBARD.—If the Court please, I object to that—there is no evidence here that he had a stand in with them.

The COURT.—Objection overruled.

Q. Didn't you hear about those boats stealing fish?

A. No, sir; I never made that my business. [260]

Q. Never heard anything about it. Did you hear anything about them shooting up these traps?

A. No, sir, not until I came to town.

Q. That was after Al Weathers was arrested?

A. Well, I heard about it—I think it was when the "Dixie" arrived, or something of that sort.

A. I will ask you if you didn't suspect you were going to be arrested for receiving stolen goods, Mr. Bennett? A. Not in the least.

(Testimony of O. E. Bennett.)

Mr. HUBBARD.—I object to that, if the Court please.

Q. I will ask you if you didn't say, in substance, to Mr. Johnson, when he came out there to arrest some fish pirates, if he had any charge against you?

A. I don't remember—I don't recall any such conversation with Mr. Johnson.

Q. You don't deny having it?

A. I don't recall it—don't remember any such conversation.

Q. I will ask you if you didn't pull up your scow pretty soon after the Admiralty Cove shooting occurrence, on the 8th of July, and move your scow up into a little remote cove in Swanson's Harbor?

A. I did.

Q. That is sometimes called Pirate Cove?

Mr. HUBBARD.—I object to that as not cross-examination. It is a matter that was ruled out on the Government's case—why should we go into it now?

The COURT.—The trouble is, the witness answers before your objection gets in—he has answered the question.

Mr. HUBBARD.—Then I move to strike it out, and the witness will please not answer so promptly. I move to strike out the answer and the question both, if the Court please.

The COURT.—Motion denied.

Q. I will ask you if you didn't move your scow to Pirate Cove because you thought you would have a little more seclusion there in getting the fish un-

(Testimony of O. E. Bennett.)

loaded out of these fish thieves' [261] boats into your scow than you could at Whitestone Harbor—wasn't that the purpose of your moving up there?

A. No, sir.

Mr. HUBBARD.—We object to that; the defendant is in no way concerned in what the man moved his scow up there for, or anything else.

The COURT.—The witness has answered no, and there is nothing before the Court. Proceed.

Q. Now, Mr. Bennett, I will ask you if you didn't abandon the business as soon as Al Weathers there was arrested and put in jail?

Mr. HUBBARD.—I object to that as immaterial so far as this defendant is concerned.

The COURT.—The objection is overruled.

A. Immediately after he was arrested; yes, sir.

Q. And since that time you have put in your time very largely in walking the streets and making a defense for Al. Weathers and Ernest Stage and Ike Weathers, haven't you?

A. Yes, sir, because I knew they could not be guilty of that charge.

Q. I know—I am not asking you for your reasons—I am asking you what you did. Wasn't that interest you exhibited on behalf of these defendants mainly exhibited because you knew you yourself were guilty of receiving stolen goods, and you thought if you could break down the prosecution it would break down any prosecution that might be pending against you—isn't that what moved you in being so active on behalf of the Weathers boys?

(Testimony of O. E. Bennett.)

Mr. HUBBARD.—I object to that question, if the Court please.

The COURT.—Objection overruled.

A. State that question again.

(Whereupon said question was read to the witness.)

A. No, sir; most emphatically no.

Mr. SMISER.—That is all. [262]

Q. (By Mr. HUBBARD.) You mentioned in your testimony that your wife had a lady friend coming with her—I will ask you to state whether or not the party that was coming with your wife was a personal friend of Mr. Weathers here, the defendant? A. A personal friend; yes, sir.

Mr. HUBBARD.—That is all.

(Witness excused.)

Testimony of H. G. Byers, for Defendant.

H. G. BYERS, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HUBBARD.)

Q. State your name. A. H. G. Byers.

Q. Where do you live? A. Juneau.

Q. How long have you lived here?

A. Fifteen years.

Q. Where were you last year, during the fishing season of 1919—were you here in town?

(Testimony of H. G. Byers.)

A. Part of the time, and part of the time I was out.

Q. Were you engaged in fishing, yourself, Mr. Byers? A. Yes; I chartered a boat.

Q. Were you in Juneau on or about the 4th of July? A. Yes, sir.

Q. Do you remember to have seen the defendant here in Juneau at that time? A. Yes, sir.

Q. I will ask you if you remember to have seen him the 7th of the month, July.

A. I don't remember the date—it was somewhere between the 5th and the 9th that I seen him, but I couldn't tell the date. [263]

Q. Where was it that you saw him at that time—you say it was somewhere between the 5th and 9th but you cannot fix the exact date—where did you see him, Mr. Byers?

A. I was on the gas-boat "Agram," Mr. Estes' boat, and he was on the same boat—went from Juneau to Douglas.

Q. You say you cannot *dix* the exact date?

A. No, sir; I cannot fix the exact date.

Q. What was the purpose of this trap from Juneau over to Douglas?

A. I was working for Mr. Estes at the time, and my brother had a seine boat over there on the float, and he wanted to take it off—he was also working for Mr. Estes, and he sent us over to take this boat off the float.

Q. You state that when you went over to take the boat off the float that the defendant went with you?

(Testimony of H. G. Byers.)

A. Yes, sir.

Q. What was his object in going?

A. He went to help us.

Q. He went there to assist you in floating the boat? A. Yes, sir.

Q. How long were you over there?

A. Why, about 4 hours altogether.

Q. What time of the day of the 7th did you say that was?

Mr. SMISER.—He didn't say it was the 7th, if the Court please.

Mr. HUBBARD.—That is right, he didn't say the 7th.

Q. What time in the day was it when you went over there? A. We left Juneau about 11:30.

Q. That would be in the morning?

A. In the morning; yes.

Q. When did you get through over there?

A. I should judge it was very nearly 3 o'clock in the afternoon.

Q. Then what did you do after you floated this boat? A. We came back to Juneau.

Q. Where did you come to?

A. To the cannery, down here. [264]

Q. Northern Packing Company?

A. Yes, Northern Packing Company.

Q. The defendant was with you at that time?

A. Yes.

Q. Now, were you at the cannery that evening after dinner, or at any time later in the evening?

A. No, sir.

(Testimony of H. G. Byers.)

Q. Have you any knowledge of the time that the cannery boat left Juneau that night, if she did leave?

A. He was supposed to have left that night but I don't know whether he did or not—I left the next morning.

Q. You haven't any direct knowledge yourself as to just when the cannery boat did get out?

A. No, sir.

Mr. HUBBARD.—That is all.

Cross-examination.

(By Mr. SMISER.)

Q. What boat did you leave on?

A. I have my own boat—the “Electo.”

Q. And you are not certain as to what these dates are that you have been testifying to—might be anywhere from the 7th to the 9th?

A. Yes, somewhere along there—I remember I was in on the 4th—and I couldn't say the exact date—kept no log.

Q. What cannery were you working for, Mr. Byers?

A. At that time I was employed by the Northern Packing Company, Mr. Estes.

Q. What were you doing for them?

A. I was buying fish, with my own boat.

Q. Where from?

A. Seymour Canal down to Frederick Sound.

Q. You were buying fish out there?

A. Yes, sir—we had seiners out there working, and I was attending to the seiners. [265]

(Testimony of H. G. Byers.)

Q. Do you remember whether the steamboat "Jefferson" came in that day?

A. I don't remember.

Q. Do you know whether the Seattle came in?

A. I don't remember anything about it.

Q. And the last you saw of the defendant Al Weathers was about 3 o'clock in the evening?

A. Yes, sir.

Q. You couldn't state that he was going back out to where Bennett had a scow?

A. I don't know where they were going—he didn't say—didn't tell me where he was going.

Q. Who was with you?

A. Mr. Hanson was captain of the boat, and there was another young fellow, I don't know his name.

Q. Do you know Ernest Stage? A. Yes, sir.

Q. Was he there? A. No.

Q. And that is as close as you can come to that date?

A. Yes, sir, that is as close as I can come to the date.

Q. Somewhere between the 5th and the 9th?

A. Yes, somewhere between the 5th and the 9th.

Q. Might have been on the 6th?

A. Somewhere along there—I don't exactly know—never kept no log or anything.

Mr. SMISER.—That is all.

(Witness excused.) [266]

Testimony of W. A. Estes, for Defendant.

W. A. ESTES, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HUBBARD.)

Q. You may state your name to the jury.

A. W. A. Estes.

Q. What is your business, Mr. Estes?

A. Canning fish.

Q. Where? A. In Juneau.

Q. How long have you been canning fish here?

A. Two seasons.

Q. You say you have a cannery here in town?

A. A small cannery, yes, sir.

Q. Are you acquainted with the defendant here, Al Weathers? A. Yes, sir.

Q. How long have you known him?

A. Both of these seasons—about a year and a half.

Q. Were you in town on or about the 4th of July?

A. Yes, sir.

Q. Were you operating your cannery at that time, in Juneau—working? A. Yes, a little.

Q. I will ask you if you remember to have seen the defendant here in town on the 4th of July?

A. Yes, sir.

Q. Do you remember whether or not he left town that evening—if you have any knowledge of it?

A. Yes, he went away in the evening.

(Testimony of W. A. Estes.)

Q. Can you state, Mr. Estes, about what time it was when he went away?

A. I should say it was between 9 and 10 o'clock.

Q. How did he leave town? [267]

A. He went away on the launch "Agram."

Q. What is that—the cannery tender?

A. That is our boat; yes.

Q. Is it a cannery boat? A. Yes, sir.

Q. Now, do you remember when he came back to town again—did he come back on the "Agram" when she returned, do you know, Mr. Estes?

A. Yes, he came back on the next trip.

Q. He came back on the next trip of the "Agram." Were you here on or about the 7th of the month? A. Yes, sir.

Q. Where were you that day?

A. I was at the cannery.

Q. Do you remember whether or not you saw the defendant there on the 7th of the month?

A. Yes.

Q. What transpired there, or what occurred there, that day in which the defendant had a part or did anything?

A. I had Tay Byers bring up some fishermen who had been to Seymour Canal, and in the arrangements they had to launch a boat over in Douglas, and he got several of the boys, and among them Weathers, and they went over on this launch "Agram," and launched that boat on this day.

Q. You remember that Al Weathers, the defendant here, went over to Douglas? A. Yes, sir.

(Testimony of W. A. Estes.)

Q. At the time the boat was launched Al Weathers went over? A. Yes, sir.

Q. How long were they over there, if you remember?

A. I couldn't say—I should say a couple or three hours.

Q. Did the parties return to Juneau after that?

A. Yes, sir.

Q. Have you any recollection whether or not the "Agram" left that evening for any place?

Mr. SMISER.—I object to the suggestion. [268]

Q. What did the "Agram" do that evening, if anything—the boat "Agram"?

A. They left and went after fish.

Q. Do you know where the "Agram" went to?

A. Well, they went out in Icy Straits.

Q. Who left on the "Agram," if you recall—who was on the "Agram" when she left?

A. A man by the name of Hanson, and a man by the name of Lloyd, and Weathers.

Q. Can you fix about the time that they left Juneau that day?

A. She usually left about the same time—about 9 o'clock.

Q. Well, is it your recollection that on this occasion, the 7th, that is the time they left?

A. Yes, sir.

Q. Do you know whether or not you were working your cannery that day—operating that day?

A. We wasn't running at that time—sometimes canned a few, but there wasn't many fish.

(Testimony of W. A. Estes.)

Q. There were not many fish?

A. Not very many.

Q. Are you acquainted with the boat they call the "Diana"? A. Yes, sir.

Q. How long have you known anything about her?

A. Oh, I should judge three or four years.

Q. About what is the speed of the "Diana," if you know? A. About 7 miles.

Q. Had you had any interest in the "Diana" prior to the time the Weathers boys purchased the boat? A. Yes; we used to own it.

Q. When you were the owners of the boat had you made a contract with the Standard Oil Company for oil for the boat, the "Diana"? A. Yes.

Q. When you sold the boat to the Weathers boys did you—or to Al Weathers, did he carry that contract over, or was it carried over so that he could get oil the same as you had [269] contracted for?

A. I don't know whether Hanson had any talk about that with the Standard Oil or not—I don't know anything about it.

Mr. HUBBARD.—If you don't know, that is all.

Cross-examination.

(By Mr. SMISER.)

Q. Mr. Estes, you say you saw the defendant Al Weathers here on the 4th of July, and that he left about 9 o'clock that night and went back into Icy Straits? A. Yes, sir.

Q. And that he returned here after that. Now,

(Testimony of W. A. Estes.)

you are not very clear as to that date, are you, when he returned? A. Well, he was there on the 7th.

Q. He was where?

A. He was here in town on the 7th.

Q. Well, now, how do you know that he was here on the 7th?

A. Because he helped move that boat.

Q. How do you know that boat was moved on the 7th?

A. We started these men out the first Monday after the 1st of July.

Q. The first Monday after the 1st of July?

A. Yes; and that came on the 7th of July.

Q. Well, you looked the date up—arrived at it that way, did you? A. Yes, sir.

Q. What day did the 4th of July fall on?

A. Friday, I think.

Q. Saturday, the 5th, Sunday the 6th and Monday the 7th, and you saw him here that day. You are not clear in your own mind when he came, however, from Icy Straits after he left here the night of the 4th?

A. They got back here in the night some time.

Q. What night?

A. That would be between the 6th and 7th—I wouldn't know when they came in—I didn't see anything.

Q. You were asleep, but you saw him here on the 7th. Now, when [270] they left where were you—when they left on the 7th, the evening of the 7th, where were you—at home? A. Yes, sir.

(Testimony of W. A. Estes.)

Q. Where did you live? A. Right on the dock.

Q. You say you think it was about 9 o'clock when they went back to the Straits?

A. Just about that; yes, sir.

Q. When did you see Al Weathers next after that? A. I couldn't tell you.

Q. Couldn't tell the date? A. No, sir.

Q. You couldn't have told any of these dates if you had not gone and looked up the occurrence or something else that you fixed it by, could you?

A. I did that; yes.

Q. You were here as a witness for Ernest Stage, and you fixed the date that he was here on the 8th, by looking up a ticket that you say was for unloading fish from the boat "Thalia" and which Ernest Stage helped unload on the 8th, did you not?

A. Yes, sir.

Q. And you have done the same thing in this case, gone back and fixed the date by something that occurred, and you base your testimony according to those dates now? A. Yes, sir.

Q. Now, Mr. Bennett was buying fish on a commission for your company, was he not?

A. No, sir.

Q. He was not? A. No, sir.

Q. He wasn't furnishing you with fish that he bought? A. We bought fish from him.

Q. Wasn't he buying fish for you on a regular commission? A. No, sir.

Q. He was not? [271] A. No, sir.

Q. You didn't pay him a commission on them?

(Testimony of W. A. Estes.)

A. No, sir, we didn't—we bought the fish outright.

Q. He wasn't representing your company then in the purchase of fish? A. No, sir.

Q. If he were buying fish from men who were stealing them out of the traps you would have no knowledge of the fact? A. No, sir.

Q. I presume you heard of the trap robberies during that time which were being committed, did you not?

A. I heard about it—mostly later on. There was quite a lot of talk later on in the season about traps being robbed.

Q. Along in June and the first of July wasn't there a great deal of talk?

A. No, I don't think so, because the fish didn't run that early.

Q. Didn't you notice the papers writing it up along about the first two weeks in July?

A. I couldn't state the date. I heard talk after we saw the battle ships in here.

Q. This boat, the "Diana," you had sold, or your company had sold to the Weathers boys the first of the season, I believe?

A. Yes, about the first of the year.

Q. And had they paid for the boat at that time?

A. They hadn't paid all of it.

Q. I will ask you if part of the pay of that boat wasn't a credit to their account for fish that they would deliver?

A. No, they never delivered any fish to us.

(Testimony of W. A. Estes.)

Q. They never delivered any fish to you direct, but didn't they deliver fish to Bennett?

A. Well, I wasn't out there, and I don't know anything about their deals at all.

Q. If they were robbing fish-traps and delivering fish to Bennett you had no knowledge of it?

A. No, sir.

Mr. SMISER.—That is all. [272]

Redirect Examination.

(By Mr. HUBBARD.)

Q. Where was the purchase of the boat made—where did it take place, Mr. Estes—up here or down below? A. When Weathers bought it?

Q. Yes, when they bought it. A. In Seattle.

Q. They didn't buy the boat in Alaska at all?

A. No, sir.

Q. You say there was something still due on the boat? A. Yes, sir.

Q. Were you carrying that or was the bank carrying it? A. The bank.

Q. So far as you were concerned the transaction had been completed? A. Yes.

Mr. HUBBARD.—That is all.

Recross-examination.

(By Mr. SMISER.)

Q. Were you guaranteeing—endorser on that note that the bank had, or did the bank take it without your endorsement?

A. I couldn't say just how that was arranged—it was turned over to the bank.

(Testimony of W. A. Estes.)

Q. The bank wouldn't take it without your endorsement, would they?

A. Probably not—I forget just how that was done, but I know it was turned over to the bank.

Mr. SMISER.—That is all.

Q. (By Mr. HUBBARD.) I will ask you whether or not the bank did not have a mortgage on the boat, and that mortgage was carried on the boat until Weathers sold it up here? A. Yes.

Q. (By Mr. HUBBARD.) So far as you were concerned you had no interest in the boat, and the bank had a mortgage?

Mr. SMISER.—I object to that as leading.

Mr. HUBBARD.—That is all. [273]

(Questions by Mr. SMISER.)

Q. Mr. Estes, let me ask you one more question. If you did not guarantee to the Standard Oil Company the oil furnished to the "Diana," and if it wasn't charged to you or your company in order to get a cheap rate of oil—a cheaper rate than they would pay at the oil dock?

A. Since they bought the boat?

Q. Yes, after they purchased the "Diana."

A. No.

Q. Didn't they call you up and didn't you endorse or stand good for the oil bill and let it be charged to you? A. No, sir.

Q. Because they didn't know Al Weathers?

A. No.

Q. You didn't? A. No.

Mr. SMISER.—That is all.

(Testimony of W. A. Estes.)

Redirect Examination.

(By Mr. HUBBARD.)

Q. Do you know whether the contract with reference to that oil matter, that it was carried over on the boat and they could buy it—

Mr. SMISER.—I object to that—my examination on that was cross-examination.

Mr. HUBBARD.—Well, I will withdraw the question.

Q. Can you recall, Mr. Estes, what that contract was, whether or not a contract passed to Weathers at the time that he bought the boat? Of course if you don't remember it you don't know anything about it.

A. I will tell you—there are two of us run this business; I attend to the cannery and my partner looks after the fish. If there was any talk with the Standard Oil about anything like that I don't know anything about it because I never talked with them about it.

Mr. HUBBARD.—That is all.

Witness excused. [274]

Testimony of George M. Leghorn, for Defendant.

GEORGE M. LEGHORN, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HUBBARD.)

Q. You may state your name.

(Testimony of George M. Leghorn.)

A. George M. Leghorn.

Q. Where do you live, Mr. Leghorn?

A. Live here in Juneau.

Q. What are you doing?

A. Working with Charles W. Warner Company.

Q. What is your line of work? A. Machinist.

Q. Do you know where the Northern Packing Company's cannery is here? A. Yes, sir.

Q. Did you ever work there? A. I did.

Q. When? A. Last summer.

Q. How long did you work there?

A. Worked there about six months.

Q. What were you doing?

A. I was cannery foreman and machinist.

Q. While you were working at the cannery, I will ask you—do you know the defendant here, Al Weathers? A. Yes, sir.

Q. When did you first get acquainted with him so that you knew him?

A. Shortly after I first came up here, after the first of June.

Q. You came up, you say, in June?

A. Yes, sir.

Q. Did you go to work immediately at the cannery. A. Yes, sir.

Q. When did you say you got acquainted with the defendant there?

A. Shortly after that—I couldn't say the exact date.

Q. Were you there at the cannery on the 4th of July? [275] A. Yes, sir.

(Testimony of George M. Leghorn.)

Q. I will ask you to state whether or not you recall seeing the defendant there on that date?

A. I do, very distinctly.

Q. Do you remember what time of day it was you saw him there?

A. I saw him in the afternoon, first, and then again in the evening.

Q. Would that be after dinner, do you mean, or prior to the dinner hour? A. After dinner.

Q. I will ask you if the "Agram" was in town at that time? A. Yes, sir.

Q. I will ask you if it went out on that date?

A. Yes, sir.

Q. Were you there at the cannery on or about the time she left? A. I was.

Q. You may state to the jury whether or not this defendant was there and left on the "Agram" at that time? A. Yes, sir.

Q. Can you fix about the hour that they left there?

A. It was about 9 o'clock—may have been a few minutes to or a few minutes after—very close to 9 o'clock.

Q. Have you any way of fixing the time other than just your memory—have you any particular event or anything that fixes the exact time or nearly the exact time? A. Yes, sir.

Q. You say it was in the neighborhood of 9 o'clock? A. Yes, sir.

Q. You may state what you have to fix your memory as to that time.

(Testimony of George M. Leghorn.)

A. We had a lot of cans come on the "Admiral Evans," and I had gone over to the dock and asked the man what time they would be over there, and he said they would be over about 9 o'clock, and I went home; then I went back to the cannery at 9 o'clock, and I saw the "Agram" there just getting ready to pull out—the boys were all ready to go. [276]

Q. I believe you stated the defendant here was one of the men that went out on the "Agram"?

A. Yes, sir.

Mr. HUBBARD.—That is all.

Cross-examination.

(By Mr. SMISER.)

Q. When did the "Admiral Evans" arrive?

A. She didn't arrive until about midnight.

Q. Of what day? A. The 4th of July.

Mr. HUBBARD.—Just a moment—may I ask another question or two?

Q. (By Mr. HUBBARD.) I will ask you if you were there at the cannery—working there—on the 7th of the month?

A. Yes, sir.

Q. (By Mr. HUBBARD.) What were you doing at the cannery that day, do you remember?

A. They were butchering fish in the forenoon and canning fish after dinner—late in the afternoon we started to can fish.

Q. (By Mr. HUBBARD.) You may state whether or not you saw the defendant here, Al Weathers, at the cannery in Juneau on that day?

(Testimony of George M. Leghorn.)

A. I couldn't say whether it was the 7th or not. It was a few days after the 4th—the next trip of the “Agram.”

Q. Did anything occur on that day you say you cannot fix absolutely as the 7th, but at that time was Weathers doing anything there that attracted your attention especially?

A. I asked him what he was doing in town again so soon for—

Mr. SMISER.—I object to any conversation between them.

The COURT.—Yes, do not tell what the conversation was.

Q. (By Mr. HUBBARD.) Do you recall the day when Mr. Estes sent men across the bay to float a boat?

A. Yes, sir.

Q. Do you remember that occurrence?

A. Yes, sir.

Q. Were you working there at the time? [277]

A. I was; yes, sir.

Q. Can you fix the day that was of the month?

A. It was the first Monday after the 4th.

Q. Now, I will ask you if you recall whether or not this defendant was one of the men that went over to float that boat? A. He was; yes, sir.

Mr. HUBBARD.—That is all.

Mr. SMISER.—No questions.

(Witness excused.)

Testimony of Martin Holst, for Defendant.

MARTIN HOLST, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HUBBARD.)

Q. You may state your name to the jury.

A. Martin Holst.

Q. Where do you live? A. Juneau.

Q. What is your business, Mr. Holst?

A. Fishing.

Q. How long have you lived here?

A. Twenty years.

Q. Do you know the defendant here?

A. Yes, sir.

Q. How long have you known him?

A. A couple of years.

Q. I will ask you if you saw the defendant on the 11th of July of last year? A. Yes.

Q. About what time was it on the 11th?

A. About 10 o'clock in the forenoon. [278]

Q. Where was he when you saw him?

A. Up on the bar between here and Auk Bay.

Q. How far would that be from town?

A. Six miles.

Q. Did he have a boat with him? A. Yes.

Q. What was the condition of the boat when you saw him?

A. He was laying way up in the grass—way up

(Testimony of Martin Holst.)

in a high place on the bar where it is dry, when I came by.

Q. Were you coming into Juneau or going out?

A. I was going out.

Q. And his boat, you say, was laying up—

A. Yes, it was pretty near dry.

Q. Was the boat standing up straight, or laying over, or how? A. Laying there.

Q. Did you stop there for any length of time?

A. Yes, I stopped for a few minutes—he wanted me to wait and pull him off when the tide came in.

Q. I will ask you if you did wait?

A. No, I didn't wait because I wouldn't take the chance with my boat—the tide was pretty small, and I told him I had no time to wait, I had to get over to the cannery.

Q. What time of day did you say it was?

A. Eight or nine o'clock.

Q. Of what day? A. The 11th.

Q. What time did his boat go up?

A. Must have been the night tide.

Q. What time at night?

A. Somewhere about 11 or 12 at night.

Q. He went on to that place on the high tide about the 10th of the month? A. Probably.

Q. There was no tide between 10 o'clock and the time you saw him? A. No, there was no high tide.

[279]

Q. So taking into consideration the position of his boat he must have gone up on the tide the night of the 10th? A. Yes.

(Testimony of Martin Holst.)

Q. That is my understanding of what you testified to—is that right? A. Yes.

Q. How was the tide the night of the 9th?

A. Was a pretty good-sized tide—I have forgot how big they were—they were a whole lot bigger tide at night than day.

Q. Now, could his boat have gone up in the position it was on the day tide?

A. Not on the day tide; no.

Q. Had to be a night tide? A. Yes.

Q. Did you state the name of the boat that he had there at that time? A. “Diana.”

Q. That was the boat you saw up on the bar, you say? A. That was the boat.

Q. And you saw the defendant there on the boat?

A. I did.

Q. Had you known the boat prior to that time?

A. No—I didn’t know what he was doing.

Q. I mean did you know the boat prior to the time you saw it there—had you seen it before?

A. Oh, yes, I seen it several times.

Q. You knew the boat? A. Yes.

Q. It was the “Diana” you saw on the bar—did you see the boat early in the spring of that year?

A. Yes.

Q. What was she doing then?

A. Fishing halibut.

Mr. HUBBARD.—That is all. [280]

Cross-examination.

(By Mr. SMISER.)

Q. How near were you to the boat? A. Sir?

(Testimony of Martin Holst.)

Q. How near did you get to his boat?

A. About 4 or 5 feet—she was up on the bank and I was down where there was water.

Q. Who was on the boat?

A. Them two brothers—Weathers boys.

Q. Anybody else?

A. I didn't see nobody else.

Q. And that was on the 11th of July? A. Yes.

Q. Why do you recall that date now?

A. Oh, just happened I came in the night before and I couldn't go over on the day tide—that is the way—I looked at the tide tables and I am pretty sure it was the 11th, as near as I can recall—I was running in every day for the cannery.

Q. There is nothing particular to make you remember that date, is there?

A. No; I never marked it down or anything.

Q. It might have been the 12th?

A. No—it was the day before—I couldn't get over on the day tide, and I had to come over on the night tide.

Q. There is nothing particular that makes you know it was the 11th and not the 12th—it might have been the 12th as well as the 11th?

A. No, I am pretty sure it was the 11th.

Q. What makes you so sure now?

A. Because there was another fellow coming across the bar and he knows it was the 11th—we were talking it over—I was talking to him and he told me it was the 11th, and he stopped and pulled the "Diana" off.

(Testimony of Martin Holst.)

Q. That is what makes you think it was the 11th, because he told you so? [281]

A. As near as I can recollect.

Q. And after you talked it over with him and he told you it was the 11th that made you think it was the 11th—you don't know yourself whether it was the 11th or not, do you?

A. That is as near as I can remember.

Q. Now, did he pull her off that same evening that you passed by? A. How?

Q. Did he pull the boat off that night that you passed it—you passed it the 11th, you think?

A. I came in on the night tide, and came in again on the day tide.

Q. When did this other fellow pull this boat off?

A. He said he helped pull it off.

Q. I know, but when—the 11th or the 12th?

A. The 11th—that same time I went over the bar—I didn't want to stay and wait for the tide, but he got them off all right.

Q. The little boats going from here to Icy Straits usually go out over the bar when the tides will permit, do they not? A. The small boats?

Q. Yes. A. Yes.

Q. It is a good deal farther around the other way? A. Yes.

Q. How much farther is it around?

A. Twenty miles.

Q. About three hours run for an ordinary small boat, isn't it?

A. Yes—two hours and a half—it takes all of

(Testimony of Martin Holst.)

that much longer to go around the Island than to cross the bar.

Q. Do you know where Whitestone Harbor is?

A. Yes.

Q. That is up in Icy Straits, isn't it? A. Yes.

Mr. SMISER.—That is all. [282]

Redirect Examination.

(By Mr. HUBBARD.)

Q. I want to ask you a question about these small boats going out from here. Do you know the water that the "Diana" draws?

A. Four or five feet, I guess.

Q. Do boats of the size of the "Diana" ordinarily go over the bar or not?

A. Yes, they do on the big tides—on the big tides.

Mr. HUBBARD.—That is all.

(Witness excused.)

(Whereupon court adjourned until 10 o'clock tomorrow morning.)

MORNING SESSION.

February 17, 1920, 10 A. M.

Testimony of Daniel McMillan, for Defendant.

DANIEL McMILLAN, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. You may state your name.

(Testimony of Daniel McMillan.)

A. Daniel McMillan.

Q. What is your business?

A. Merchant.

Q. Where? A. In Juneau.

Q. How long have you been in the mercantile business in the town of Juneau?

A. Growing on 6 years.

Q. Do you know the defendant in this case, Al Weathers? A. I do.

Q. How long have you known him approximately? A. Growing on 4 years.

Q. Did you see him on the 4th day of July, 1919?

A. I did. [283]

Q. Where? A. On the street.

Q. About what time of day was it?

A. Oh, somewhere in the afternoon, about 3 o'clock.

Q. Did you transact any business for him on that day?

A. I did—I put up an order for him that evening—he gave me an order to put up for goods.

Q. Where was that order delivered?

A. It was delivered at Cash Cole's barn.

Q. About what time of day, Mr. McMillan, as near as you can get at it?

A. Some time in the evening, after dinner—must have been between 6 and 7 o'clock—around there. We had dinner at 5 o'clock, and I remember coming down and delivering the order to him.

Mr. HUBBARD.—That is all.

Mr. SMISER.—No cross-examination.

(Witness excused.)

Testimony of Albert Martin, for Defendant.

ALBERT MARTIN, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. What is your full name?

A. Albert Martin.

Q. Where do you live, Mr. Martin?

A. On 9th Street—between 9th and 10th Streets.

Q. In the town of Juneau? A. Yes, sir.

Q. How long have you been around Juneau?

A. Beg pardon?

Q. How long have you been in this portion of the country?

A. About 10 or 11 years. [284]

Q. Do you know the defendant in this case, Al Weathers? A. Yes, sir.

Q. How long have you known him?

A. For about 5 or 6 years.

Q. Did you see Al Weathers on the 11th day of July of last year? A. Yes, sir.

Q. Where did you see him?

A. On the bar, between here and Auk Bay.

Q. What time of day was it that you saw him?

A. What happened?

Q. No, what time—

A. It was about 9 o'clock in the morning, I would imagine.

Q. Where was he then—where was Al?

(Testimony of Albert Martin.)

A. He was on the boat—on the “Diana.”

Q. Where was the “Diana”?

A. On the bar, about 100 feet from the channel.

Q. The bar is about how far from the town of Juneau? A. About 7 miles.

Q. In the direction of Auk Bay. Now, how did you happen to be there at this time?

A. We went down the previous night to get some herring, and I was coming back.

Q. How was the stage of the water at the time you saw him?

A. Well, the bar wasn't quite covered with water, but the water was quite high. We managed to get over the bar with our boat, but the tide wasn't quite high—I would imagine it would be about a three-quarters tide.

Q. Where was he with reference to the edge of the channel across the bar?

A. He was on this side—a little bit on this side of the bar and about a hundred feet out of the channel, and up on a high sandbar to the left coming this way.

Q. Do you remember the condition of the tide about that time?

A. It was about a three-quarter tide.

Q. Now, from the position that he was in— [285]

A. You mean the boat?

Q. Yes.

A. Why, the boat was about, I would imagine, about a 45-degree angle—she wasn't quite afloat—

(Testimony of Albert Martin.)

she wouldn't be floating for an hour and a half year.

Q. From the condition of the tides at that time, what time would you figure his boat must have gotten up on the bar?

A. Undoubtedly he got up on the bar the night before—the previous tide.

Q. About what time of night would that be?

A. Have to get on at high tide.

Q. About what time?

A. I couldn't say—I imagine the high tide at that time would be about half-past ten.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. SMISER.)

Q. What business were you in at that time, Mr. Martin?

A. At that time I was experimenting with fish. I had been carrying on experiments down in the tide flat, and we are going down to Salt Lake to get some herring.

Q. Did you have a boat?

A. We had a small boat named the "Lillian," belonging to a man named Peterson—a 20-foot boat.

Mr. SMISER.—That is all.

Redirect Examination.

(By Mr. RODEN.)

Q. How do you know that was the 11th, Mr. Martin?

(Testimony of Albert Martin.)

A. I paid the expenses, or part of the expenses, for the oil—here is an account of it.

Q. Have you got a memorandum with you that you made on that day?

A. Here is the account of it.

Q. What does it say? [286]

A. To cash, provisions boat to Eagle River for fish—no herring running—\$1.50.

Q. And that was on this occasion, was it?

A. July 11th.

Mr. RODEN.—That is all.

(Witness excused.)

(Whereupon court adjourned until 1:30 P. M.)

AFTERNOON SESSION.

February 17, 1920, 1:30 P. M.

Testimony of M. H. Truesdale, for Defendant.

M. H. TRUESDALE, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HUBBARD.)

Q. You may state your name to the jury.

A. M. H. Truesdale.

Q. Where do you live, Mr. Truesdale?

A. Juneau.

Q. For how long?

A. A little over six years.

Q. What is your business here?

(Testimony of M. H. Truesdale.)

A. Gunsmith.

Q. What experience have you had with reference to the handling of guns and ammunition?

A. I have had a great deal.

Q. For how many years? A. Thirty years.

Q. I desire you to look at this bullet and examine it, and then I will ask you to state your opinion after you have looked at it. Now, you may state, Mr. Truesdale, whether or not in your opinion that bullet has been fired through a gun.

Mr. SMISER.—I object to that, if the Court please. I don't think that is a question that can be settled by that kind of testimony. [287]

The COURT.—The objection is overruled.

A. Well, there are two answers to that—not with a full service load. It has either been shot with a very light load, or else it has been forced through the barrel with a rod, and I can explain why, if you wish me to.

Q. Well, you may state your reason for it.

A. A full service load when shot in a bullet of that kind, the expansion at the base draws these riflings out so it will show a flange back on each side, and the rifling would be cut deeper all the way through—from an eighth to three-sixteenths of an inch—it shows heavier there than it does anywhere else on the bullet; and that one shows even all the way through—there is no flange there at all, and there is nothing showing back here. A light load will force that through the gun—it hasn't the pressure here to upset it, but it will still drive it

(Testimony of M. H. Truesdale.)

through the barrel—it is impossible to say whether it has been shot or not, but I say in my opinion it has never been shot with a full service behind it.

Q. I will ask you if there is any indication on that bullet that it was not shot out with a full service behind it. A. I would say yes.

Q. What are your reasons?

A. There are several dents in the end on the side that looks as if it had been used with a rod smaller than the caliber of the gun, and it didn't strike it in the center.

Q. Now, I will ask you to look at the point of that bullet and state whether that was ever fired out of a gun and struck a hard substance, sufficient to check it. A. No, sir.

Mr. HUBBARD.—That is all.

Cross-examination.

(By Mr. SMISER.)

Q. The force with which it would strike, Mr. Truesdale, would depend upon the velocity it was going at the time it struck [288] the object which it did strike, wouldn't it?

A. It would; but that doesn't look, in my estimation, as if it had ever any very great velocity.

Q. But if it struck something at the time its force was spent, or largely spent, it might strike without doing any serious damage to the bullet itself, might it not?

A. That would depend on what it hit.

Q. Well, if it hit in the rigging of a mast, or hit some wood, and had nearly spent its force, could

(Testimony of M. H. Truesdale.)

it not do that without disfiguring the bullet?

A. Well, it would show a mark if it hit metal.

Q. But if it hit a soft piece of wood or in the rigging of the mast?

A. A soft piece of wood would not necessarily make a mark.

Q. Or if it hit in the rigging—that is, the ropes of the mast, that wouldn't make a mark, would it?

A. No, I don't know as it would.

Mr. SMISER.—That is all.

Redirect Examination.

(By Mr. HUBBARD.)

Q. I will ask you if that should hit against a steel mast of a cannery tender, what would be the result. A. It would show very plainly.

Q. That is, the steel collar on the mast?

A. Yes, sir. There is one mark here on the side, right there, which is very slight, but if it struck anything enough to dent it there that dent would show a long ways back—it doesn't—it just shows on the side like that—it has just a little dent in there, and if that bullet had struck it would show a line on the bullet—if it struck it enough to glance it it would still show, but this is just a little dent on the side of the bullet—not over a sixteenth of an inch.

Q. Can you tell by looking at that bullet what make of ammunition is it?

A. Yes, sir; it is Government ammunition.

(Testimony of M. H. Truesdale.)

Q. What is the powder charge behind a bullet of that kind—Government ammunition?

A. About 54 grains.

Q. If it had been fired out of a shell containing 54 grains, would it not show indications of having been fired other than what you see there?

A. It would.

Mr. HUBBARD.—That is all.

(Witness excused.)

**Testimony of O. E. Bennett, for Defendant
(Recalled).**

O. E. BENNETT, upon being recalled as a witness on behalf of the defendant, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. HUBBARD.)

Q. You have been sworn, Mr. Bennett?

A. Yes.

Q. I want you to look at this photograph and state whether or not you have seen it before.

A. Yes, sir.

Q. When was it that you—do you know where the photograph was taken, or who took it?

A. Yes, sir, I think my wife took the photograph.

Q. Were you there at the time? A. Yes, sir.

Q. What does it represent, that photograph?

A. It represents two fish-traps, I think, at Strawberry Point.

Q. When was it taken, do you recall?

A. Some time in the fall, I believe—September.

(Testimony of O. E. Bennett.)

I was on a hunting trip.

Q. Where was it taken from?

A. Taken from the gas-boat "Diana."

Q. Taken from the deck?

A. Taken on the deck of the boat; yes, sir. [290]

Q. And while you were there at the time the photograph was taken I will ask you to state whether or not you had occasion to observe the distance between those two fish-traps.

A. Yes, sir; that is the reason the picture was taken.

Q. What is the distance between the two traps?

A. I should judge nearly a mile, or at least 3,000 feet—3,000 or 4,000 feet.

Q. Is there any other trap-site in between these two traps?

A. It occurs to me there was an abandoned trap-site there.

Q. Any old piling driven?

A. Some old piling driven in between the two traps.

Mr. HUBBARD.—We offer this in evidence, if the Court please.

Mr. SMISER.—No objection.

(Whereupon said photograph was received in evidence and marked Defendant's Exhibit No. 2.)

Q. Mr. Bennett, I will ask you this question; you stated in your original examination that you were buying fish on a commission, I believe?

A. Yes, sir, I received a commission of one cent—that is, my profit was one cent commission.

(Testimony of O. E. Bennett.)

Q. Let us understand—you say you received, or you paid so much for the fish?

Mr. SMISER.—Let the witness tell, and not counsel.

A. I paid so much for the fish; yes, sir.

Q. Just state how you handled the fish there.

A. The Northern Packing Company made a stipulated price of what they would pay, and I received one cent on the ground there less than I sold them for, or rather than I sold them to the Northern Packing Company for, which would give me one cent profit.

Q. Had the Northern Packing Company made that price to others, or was it just to you?

A. I think that was the stipulated standard price that the canneries who were purchasing fish had. I know the Northern Packing Company paid the same price other canners were paying. [291]

Q. And in buying in the fish you simply paid the fisherman one cent less for each fish than you would sell them here in town for?

A. Yes. For instance, if the Northern Packing Company was paying 11 cents in town, I paid 10 cents for them, and made a profit of one cent a pound.

Q. And that is what you meant when you said a commission? A. Yes, sir.

Mr. HUBBARD.—That is all.

Cross-examination.

(By Mr. SMISER.)

Q. You said in your cross-examination the other

(Testimony of O. E. Bennett.)

day that you had taken quite an interest in the defense, I believe, and were working up his testimony? A. Yes, sir.

Q. I will ask you if in the season of 1918 Al Weathers wasn't arrested for stealing fish, and if you didn't do the same thing then?

Mr. HUBBARD.—I object to that—I do not think it is admissible, if the Court please.

Mr. SMISER.—I think it is competent to show his interest in Al Weathers' actions.

The COURT.—What do you mean by doing the same thing?

Mr. SMISER.—Helped work up his testimony, for one thing, and came in and testified in his behalf, for another.

The COURT.—The objection is sustained.

Q. I will ask you if you did not appear as a witness for him on the trial of the case when he was indicted for stealing fish during the season of 1918—as the main witness, to prove an alibi for him?

A. No, sir—as a character witness only—I knew nothing of the case.

Q. I will ask you whether or not you and Weathers lived together at any time. [292]

A. He is living in my house at the present time—never prior to that.

Q. He is now?

A. Living in my house at the present time, but never prior to the last two or three weeks.

Q. Who else, if anyone, was present with you

(Testimony of O. E. Bennett.)

when your wife made this photograph—who was along on that trip?

A. When my wife made what?

Q. This photograph of the traps.

A. Mrs. Anderson was present.

Q. Anybody else? A. Al Weathers and myself.

Q. Al Weathers was present?

A. The four of us had an outing party.

Q. What boat were you using?

A. The “Diana.”

Q. How long were you out on that trip?

A. About two weeks.

Q. That was in the latter part of September, last year?

A. I don’t know what part of September it was—some time in September—during his release on bonds.

Mr. SMISER.—That is all.

(Witness excused.)

DEFENDANT RESTS. [293]

REBUTTAL.

Testimony of W. E. Fielding, for the Government (Recalled in Rebuttal).

W. E. FIELDING, called as a witness on behalf of the Government, having been previously duly sworn, testified in rebuttal as follows:

Direct Examination.

(By Mr. SMISER.)

Q. Please state your name. A. W. E. Fielding.

(Testimony of W. E. Fielding.)

Q. What is your business, Mr. Fielding?

A. Agent, Standard Oil.

Q. Were you acting as such during the spring and summer of 1919? A. Yes, sir.

Q. I will ask you whether or not the "Diana" purchased oil from you during the spring of 1919?

A. It did.

Q. I will ask you to whom you charged the oil that was purchased by the "Diana"?

A. Charged it to the launch "Diana."

Q. Did you have any agreement with the Northern Packing Company in regard to it?

A. Not at that time—when it first came up.

Q. What was done at any time about that?

A. Well, at first?

Q. Yes.

A. It was charged to the Northern Packing Company because we formerly had it under that account, the season before. When Al Weathers came up he advised me to charge it to the Northern Packing Company, because it was formerly charged to that account, so that he would get the price, and then later on in the season, when the Northern Packing Company's man came up here, I called them up, or was talking with them over the phone, or had a verbal conversation with them at the dock, and it was O. K. to charge it to their account.
[294]

Q. Do you know Mr. Estes, of the Northern Packing Company? A. Yes, sir.

Q. Is he the one you refer to?

(Testimony of W. E. Fielding.)

A. It was either Estes or Hanson—Hanson comes down to the dock there for the oil—it was either one of them—I wanted to get a confirmation.

Q. And they confirmed the arrangements you had made? A. It would be all right.

Q. All right to charge it to the Northern Packing Company? A. Yes.

Mr. SMISER.—That is all.

Cross-examination.

(By Mr. HUBBARD.)

Q. By having the oil charged up the way it was, the Weathers, who were then operating the “Diana,” had an advantage in the price, didn’t they, Mr. Fielding? A. Yes, sir.

Mr. HUBBARD.—That is all.

(Witness excused.)

Testimony of J. H. Kline, for Defendant (In Rebuttal).

J. H. KLINE, called as a witness for the *defendant*, being first duly sworn, to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. SMISER.)

Q. Please state your name. A. J. H. Kline.

Q. What position do you occupy here?

A. Agent, Pacific Steamship Company.

Q. I will ask you whether the “Admiral Evans” belongs to your line? A. Yes, sir.

(Testimony of J. H. Kline.)

Q. Have you a record of the dates of the "Admiral Evans" during [295] July, 1919?

A. Yes, sir.

Q. In and out of Juneau? A. Yes, sir.

Q. I will ask you to state when she was in here nearest the 4th of July last—when did she arrive?

A. She got into our dock at 3:30 A. M. the morning of the 4th, and left our dock at 10 A. M. the morning of the 4th.

Q. Was she here during the night hours—the night of the 4th.?

A. I have no record, but I am pretty sure she was—she had a lot of cargo—she came down to McBride's, and came down again at this end of town, but the only actual record I have is of my own dock.

Q. She left here at what time?

A. Ten o'clock in the morning, from my dock.

Q. Do you know what time she left Juneau?

A. No, I couldn't state.

Q. Can you approximate the time?

A. Not without looking up other records, no, sir—you mean by Juneau, the channel?

Q. Yes.

A. No, I would have to look up some other records. The only record I have here is my own dock.

Q. Did she come back to your dock any more?

A. No, sir.

Q. She left here at ten o'clock in the morning?

A. Left the Pacific Steamship dock; yes, sir.

(Testimony of J. H. Kline.)

Q. When she was in the channel, she wasn't at Juneau, then?

A. Not at our dock. She may have been over to Femmer and Ritter's or the Cole dock, or she may have been down to the cannery dock.

Q. Have you any other records you could determine that from? A. Yes, sir.

Q. How long would it take you to get them?

A. I would have to go down to the office and get my freight abstracts, and see how much freight she had in here, and where it [296] was discharged.

Q. When was she back in Juneau, again?

A. She got here at 1:30 in the afternoon of July 19th.

Q. When did she leave?

A. Six-thirty in the afternoon.

Q. Was she in Juneau any time during those dates, from the 4th to the 19th? A. No, sir.

Q. I will ask you if the "Admiral Watson" was in here any time about those dates?

A. The "Admiral Watson" got in here at 9:45 A. M. July 11th, and left at 11:45 A. M. July 11th. She was from the Westward—was bound south.

Q. When had she been in Juneau before?

A. The 27th of June, one o'clock in the afternoon—one o'clock in the forenoon.

Q. When did she leave then?

A. Eight o'clock at night.

Mr. SMISER.—That is all.

(Testimony of J. H. Kline.)

Cross-examination.

(By Mr. HUBBARD.)

Q. You say on the 4th when she was here she had other freight besides what she discharged at your dock? A. Yes, I am sure she did.

Q. You are not sure as to what time she did leave the channel that night—was she going Westward or going south?

A. She came up from Seattle, comes here, goes out Chatham Straits, and home again.

Q. She doesn't go to the Westward at all?

A. No, sir.

Q. Where does the Northern Packing Company get its freight at—at your dock or at their own dock?

A. If they have 25 tons we make delivery to their dock; if it is less than that we make delivery at our dock. [297]

Q. If there was more than that for delivery at the cannery she would have gone to the cannery to deliver it? A. Yes, sir.

Q. Do you remember now what the shipment was to the Northern Packing Company on that date?

A. Shipment of cans around about that date.

Q. That would be more than a 25-ton shipment, would it not? A. Yes, sir.

Q. So she would have gone to that dock?

A. Yes, sir.

Q. When you speak of the other dock you mean the dock that is known as the Cash Cole dock, don't you?

(Testimony of George Johnson.)

A. We tie up partially on Cash Cole's dock and partially on Shonaker's dock—they are right together.

Mr. HUBBARD.—It is all one dock—right together. That is all.

(Witness excused.)

**Testimony of George Johnson, for the Government
(Recalled in Rebuttal).**

GEORGE JOHNSON, upon being recalled as a witness on behalf of the Government, having been previously duly sworn, testified in rebuttal as follows:

Direct Examination.

(By Mr. SMISER.)

Q. Mr. Johnson, are you familiar with the chart there so that you could tell the distance from the different points on the chart? A. Yes, I am.

Q. I wish you would take the chart here, filed as an exhibit in this case, and come over to the table, and find Admiralty Cove on this chart.

A. It is right in here.

Q. Right where you are pointing? A. Yes.

Q. Now, will you please point out Whitestone Harbor? [298] A. Right here.

Q. Now, will you please measure according to the scale on the map here and see how far it is from Whitestone to Admiralty Cove?

A. It is a little less than ten miles.

Q. That would be a little less than 12 statutory miles? A. Yes.

(Testimony of George Johnson.)

Q. Now, about how far is it from Admiralty Cove to Juneau the way the boats would run in going over the bar, which is a shorter distance?

A. Fifty miles.

Q. Now, how far is Funter Bay from Admiralty Cove?

A. From the mouth of Funter Bay to Admiralty Cove is a little over three miles.

Q. I will ask you whether or not on the regular course from Juneau to Whitestone Harbor you pass Funter Bay?

A. Yes, it would be practically in line.

Q. Now, how far is it from Funter Bay to Whitestone? A. Eleven miles.

JUROR.—He is speaking of statutory miles?

The WITNESS.—Nautical miles.

Q. (By Mr. SMISER.) That would be how much in statute miles—it would be a little less?

A. Yes.

Mr. SMISER.—Take the witness.

Cross-examination.

(By Mr. HUBBARD.)

Q. In running on the regular course from Juneau to Whitestone you would not go nearer Funter Bay than three or four miles, would you?

A. I think going on a straight line it would be about two miles off, I think.

Q. Do you know the distance around Douglas to Whitestone? A. To Whitestone? [299]

Q. Yes, going around Douglas Island.

A. I would have to look on the chart there—it is

(Testimony of George Johnson.)

50 miles to Admiralty Cove.

Q. By the way of Douglas Island?

A. Around Douglas Island.

Q. And you say it is about 60 knots from here to Whitestone?

A. I didn't say how far it was from here to Whitestone.

Q. I thought you were asked from Whitestone in, or from here out to Whitestone?

A. No, it was Admiralty Cove.

Q. And it is 10 knots beyond Admiralty Cove to Whitestone?

A. I think it is about 11 or 12—you can measure it on there—nautical miles.

Q. How many did you say it is from here to Admiralty Cove? A. Fifty.

Q. And about 11 from there to Whitestone?

A. Yes.

Mr. HUBBARD.—That would make about 61 miles. That is all.

Redirect Examination.

(By Mr. SMISER.)

Q. Admiralty Cove is not upon the direct line from Whitestone Harbor to Juneau, is it?

A. No, sir.

Mr. SMISER.—That is all.

(Witness excused.)

GOVERNMENT RESTS.

TESTIMONY CLOSED.

Whereupon after argument had the Court instructed the jury, orally, as follows: [300]

Instructions of Court to the Jury.

The COURT.—Gentlemen of the Jury: In the first count of this indictment which you are trying it is charged by the grand jury that Al Weathers, Ike Weathers and Ernest Stage did, *on* on the 8th day of July, 1919, unlawfully, wilfully, maliciously and feloniously shoot Alfred Knutson with intent to kill, wound and maim him, the said Knutson. In the second count of said indictment it is charged that the said Al Weathers, Ike Weathers and Ernest Stage assaulted the said Knutson by shooting at him with intent to take, steal and carry away certain fish in a trap possessed by him and others; and in the third count of the indictment it is charged that the said Al Weathers, Ike Weathers and Ernest Stage did, on the said day, assault the said Knutson by shooting at him with intent to steal, take and carry away certain fish from a scow then in the possession of said Knutson and others.

You will notice that the second and third counts are very much alike—that is, they charge an assault with intent to commit the crime of robbery, while the first count charges a shooting with intent to kill, wound or maim.

The indictment has joined all three of these defendants, and ordinarily they would be tried at one and the same time, but the defendant Al Weathers has demanded a separate trial, which he had a right to do. The question now before you is whether or not the said Al Weathers is guilty of the offenses charged against him, or either of them.

The indictment in this case, and in all cases, is simply the charge of the grand jury. It is not to be taken as evidence of the guilt of the defendant. You are allowed to take it with you into the jury-room to see just what is charged, but your function is to determine whether or not the charge is sustained by the evidence.

When the defendant entered upon this trial the law presumed him to be innocent. That presumption was a shield which the law threw around the defendant. He entered upon the trial [301] of this case with the presumption in his favor, and that presumption would entitle him to an acquittal at your hands unless the whole evidence has convinced your minds beyond a reasonable doubt that he is not innocent, but that he is guilty of the offense with which he is charged. Of course that presumption of innocence could not, in any case, prevail against the truth of guilt, if guilt be shown; and when it is said a defendant is presumed to be innocent the meaning is that it is for the prosecution to prove him guilty, and if it does not prove him guilty the presumption of innocence will prevail and entitle the defendant to a verdict of not guilty.

The separate counts in this indictment are to be considered by you somewhat in the nature of separate indictments.

You will first consider the first count, and as I have said, that is a count which charges that the defendants, including the defendant on trial, shot Knutson with intent to kill, wound or maim him.

Under this count it is incumbent upon the Government, if it would have you convict, to prove to your satisfaction beyond a reasonable doubt each material allegation of that count. The material allegations of that count are, first, that the defendant did shoot at the said Knutson. So far as the actual shooting is concerned it would not be necessary that the Government should show that Al Weathers actually fired the gun, or loaded it, or aimed it; it would be sufficient on this point if the Government should prove beyond a reasonable doubt that the shooting was done by anyone in conjunction with defendant and acting in concert and with a common purpose and understanding, and in execution of a common design; second, that said shooting, if any, was done with the intent to kill, wound or maim.

Now, the second count is under a different section of the statute, denouncing it as a crime for one to assault another with intent to rob him. The charge under this count is that the defendants, including the defendant on trial, assaulted Knutson by shooting at him with intent to rob him of certain fish in the possession [302] of himself and others in a trap of the Hoonah Packing Company situated at Admiralty Cove. To convict under this charge, the Government would have to prove to your satisfaction, beyond a reasonable doubt, that an assault was made as alleged—that is, that the defendant did shoot at Knutson, or aid in the shooting, with intent to put him in fear and by violence to rob him of the fish which it is alleged had been com-

mitted into the care of him and certain other persons and which were confined in a trap of the Hoonah Packing Company at Admiralty Cove.

Now, the third count charges very much the same as the second count, only it alleges that the fish which it is alleged the defendant intended to rob Knutson and the others of were on a scow then and there situated at or near Admiralty Cove. Under that charge it would be incumbent upon the Government, if it would have you convict, to prove, beyond a reasonable doubt, that the assault was made as alleged—that is, by shooting at Knutson, and that the intent was to rob him and the others of the fish that were on the scow aforesaid.

The charge in all three of the counts is of the doing of certain things with a specific intent, and the Government must prove the intent just as well as the act which it charges to have been committed. In other words, before the jury gets to a consideration of the intent of the defendants it must first decide whether or not the specific act charged was done—that is to say, whether or not the assault by shooting was made. If the jury decides that there was no such shooting or assault, then all the evidence as to intent is immaterial and should not be considered; but if the jury considers that it has been proven beyond a reasonable doubt that there was shooting or an assault by shooting made on Knutson as charged in the indictment, then they should consider the question of the intent with which it was made; and if the Government has proven beyond a reasonable doubt both the assault-

ing and the intent, then the jury should find the defendant guilty. [303]

But how is the jury to find with what intent an act is done, providing, of course, it finds that the act was done? The jury cannot look into a man's mind as it would open the lid of a box and peer into the receptacle. A jury can only ascertain the intent with which an act is done by considering all the facts and circumstances under which the act was done. What preceded, what accompanied, what followed, the doing of the act? What reason or motive or advantage was there in the doing of the act? What had been the previous course of the parties? What had preceded, accompanied and followed the doing of other acts of like nature, if any have been shown in evidence? Did the doers of the act have a plan and a system under which the act was done, and was the doing of the act a part of that system or plan? Such questions as these, and many others, would naturally arise in a person's mind in trying to ascertain the intent with which any particular act was done. When a man is on trial he is only tried for one offense at a time, or for such offenses as have been properly joined in the indictment. Now, in this case there are no offenses joined in this indictment except the shooting at and assault upon Knutson. There has been evidence introduced of similar offenses alleged to have been committed by the defendants at other times and places. The evidence of these other transactions was admitted before you for the sole purpose of the bearing which it might have on the

question as to intent. If you find that the defendants did not do the shooting or make the assault charged, then it would not make any difference what other offenses they, or either of them, might have been guilty of, or with what intent those other things were done. But if you find from the evidence beyond a reasonable doubt that the defendant did make the assault, then you may inquire whether or not there has been established to your satisfaction the fact that he made other assaults of like nature with intent similar to the intent charged in this case—that is, did he make other assaults with intent to kill or to rob fish-traps. In other words, the evidence [304] of other offenses can only be taken into consideration by you if you find that the particular transactions charged to have occurred at Admiralty Cove did occur and you have passed on to the question of ascertaining the intent with which those acts were done.

As to the second and third counts, the material allegations which the Government must prove beyond a reasonable doubt are the same in substance as in the case of the first count, that is, first, the doing of the act, and, second, the intent with which the act was done. It is not at all material whether there was or was not any fish in the scow or trap. The gist of the offense charged is the doing of the act with the unlawful intent—not whether the intent was frustrated.

The Government has introduced evidence which, if believed by you, tends to establish the time when, and the place where, the alleged crime was com-

mitted, and the defendant has introduced evidence which, if believed by you, tends to establish a defense of what is called an alibi—that is, that he was at another place at the time the offense was committed. The Court instructs you that all the evidence bearing upon that issue should be considered by you along with all the other evidence in the case, and if it raises in your mind a reasonable doubt as to the presence of the defendant at the time and place where the crime is charged to have been committed, if you find that a crime has been committed, you should acquit the defendant.

I have used the words “beyond a reasonable doubt.” As aforesaid it is the duty of the Government, if it would convict, to prove every material allegation of the indictment beyond a reasonable doubt. The expression “beyond a reasonable doubt” does not mean beyond every possible doubt—it does not mean beyond a captious doubt or a conjectural doubt—it does not mean that you must be satisfied to a mathematical certainty of the truth of the charge—a demonstration to a mathematical certainty is seldom possible and never required. It does not mean that you must actually know. The expression means this, that you must take all the evidence in the [305] case, and all the facts and circumstances proven in the case, and surrounding the matter in dispute, so far as they have been shown by the evidence, and after a fair and candid consideration thereof, if you are satisfied, that is, convinced, of the truth of the charge with that degree of conviction which would lead you to

act in the affairs of like importance in your own life, then you are said to be satisfied beyond a reasonable doubt. You need not be satisfied to an absolute certainty—a moral certainty is sufficient. That is to say, after considering all the evidence if you are satisfied to a moral certainty—if from that evidence you have an abiding conviction amounting to a moral certainty of the truth of the charge, you are said to be satisfied beyond a reasonable doubt. The reasonable doubt spoken of has reference to the whole case—that is to say, it has reference to the question of whether the defendant is guilty or is not guilty of the offense charged.

You are to decide this case on the evidence which has been introduced at the trial and on the law as given you by the Court. While you are the sole judges of the evidence and of its effect, yet your power of so judging is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction to your minds against a less number, or against a presumption or other evidence satisfying your minds. A witness wilfully false in one part of his testimony may be distrusted in others. Testimony is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is the power of one side to produce and of the other side to contradict; and, therefore, if the weaker and less satisfactory evidence is offered when it appears that stronger and more satis-

factory evidence was within the power of the party, the evidence offered would be viewed with distrust. Arguments of counsel are not evidence. Counsel on both sides have stated their recollection and interpretation of the evidence and the inference which they think should be drawn from that [306] evidence. It is meet and proper that you should listen to their statements and weigh their arguments in the light of your own memory, reason and common sense; but when all is said and done you are the sole judges as to what the evidence was and as to what weight should be attached to it and what deductions are to be drawn from it, for you are the sole judges of the facts and upon you rests the responsibility.

If in these instructions or during the trial the Judge of this court has said or done anything which you think indicates that he desires to influence your finding as to the facts, put such thought far from you. Rulings on the admissibility of evidence are rulings on matters of law with which you have nothing to do; and the Judge of this court did not intend, and has no right to produce or attempt to produce any such impression. In the trial of this case you are as much a part of the court, of the machinery of the law as it moves to secure justice and order among men, as is the Judge, only yours is a different function from his—he tells you what the law is and it is your duty to accept as the law what he tells you the law is. He is to see that a defendant gets a fair and impartial trial under the law of the land, and by your verdict you tell the Judge what the facts are, and then the law itself

speaks. You are trying issues between the Government and the defendant—not between the Government's lawyers and the defendant's lawyers. You are trying the defendant, not the witnesses. So far as the witnesses are concerned, all that interests you is to determine who among them has told the truth in this case and what inferences should be drawn from the testimony which you do believe.

Only that testimony is to be considered by you which has been introduced and received in evidence. If any evidence offered has been rejected by the Court you are not at liberty to speculate or conjecture on what that testimony was—you are simply not to consider the matter either for or against the defendant. You cannot go outside of the evidence or adopt any theory either for or against [307] the defendant which is not fairly and reasonably deducible from the evidence, or from the lack of evidence.

Our statute provides that in the trial of or examination upon all indictments, complaints, information, and other proceedings before any court, magistrate, jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person so charged or accused shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the Court, or to the discrimination of the magistrate, or other tribunal before which such testimony may be given, provided, that his

waiver of such right shall not create any presumption against him.

It is for you to determine which witnesses are to be believed and what weight you will attach to their testimony.

You make up your minds which witnesses are to be believed when they testify in court in very much the same manner as you determine that question in the ordinary affairs of life. A person tells you an important thing—you are anxious to know whether he is telling the truth or a falsehood—it is important that you should know. What do you do? You size him up—you consider his appearance and demeanor—you want to know whether he knows what he is talking about—you consider whether or not he was in a position to know of the truth of what he asserts, and whether he has the ability and the inclination to tell truly and faithfully what he does know; you take into consideration his candor or lack of candor; you ask yourselves, has he told me the whole truth, or is he trying to conceal something? Are his answers frank and straightforward, or are they weak, shuffling or evasive? You ask him questions or listen while others ask him questions—you cross-examine him and you note how he stands the cross-examination—you take his entire story and ask yourselves, is it reasonable—is it consistent in its various parts and does it comport with human experience and with undoubted facts and circumstances and with reason and with common sense? And, too, you would want to know [308] whether or not he has any interest or object

or purpose in telling you a falsehood instead of the truth—you would not necessarily disbelieve him because he has some interest, but you would put that interest into the scales with all the other facts and circumstances and weigh the whole thing.

Now, that is what you must do with every witness who has testified in this case, and in much the same manner you must treat every fact and circumstance appearing in this case—weigh it, measure it, hold it up to the light, look through it; accord to each fact and circumstance its due proportion in the entire scheme of events which you are considering, neither magnifying trifles nor minimizing things of importance. That is, you are to weigh the evidence and not count the number of witnesses.

Now, gentlemen, you have a solemn duty to perform—a duty to society and a duty to the defendant. If the defendant has been proven to be guilty your duty to society commands that you say so by your verdict, uninfluenced by sympathy of any kind, to the end that the laws made by society may be enforced. On the other hand, your duty to the defendant, and your duty to society, also, commands that if he has not been shown to be guilty you should acquit him, and that you should be swayed by neither passion nor prejudice nor sympathy. You are to strive to get at the truth of the matter. The punishment is in the discretion of the Court within the limit prescribed by law.

You will be handed four forms of verdict—

- 1—If you find the defendant guilty of all three of the charges you will sign the verdict which says, “Guilty as charged in the indictment”;
- 2—If you find him not guilty of any of the counts you will sign the verdict which says, “Not guilty as charged in the indictment”;
- 3—If you find him guilty of shooting with intent to kill—that is, the first count, but not guilty of shooting with intent to rob, then your verdict would be, “Guilty as [309] charged in count 1, but not guilty as charged in counts 2 and 3”;
- 4—If you find him not guilty of shooting with intent to kill, but you do find him guilty of shooting with intent to rob, then you should sign the verdict which reads “Guilty as charged in counts 2 and 3, but not guilty as charged in count 1.”

You will elect one of your number as foreman and he will sign such verdict as you may agree on.

Whereupon the jury duly retired to deliberate upon their verdict, and afterwards, to wit, on the 18th day of February, 1920, duly returned into court their verdict as follows:

“We, the jury, empaneled and sworn in the above-entitled cause, find the defendant Al Weathers guilty as charged in Counts Two and Three of Indictment, and Not Guilty as charged in Count One thereof; and we recommend clemency of the Court on account of defendant’s youth.

Dated at Juneau, Alaska, this 18 day of February, 1920.

C. J. SKUSE,
Foreman."

And afterwards, to wit, on the 20th day of February, 1920, said defendant Al Weathers made and filed herein his motion for a new trial as follows:
[310]

[Caption and Title.]

Motion for New Trial.

Comes the above-named defendant, Al Weathers, and moves the Court that the verdict in said cause be set aside and a new trial be granted him for the following causes materially affecting the substantial rights of the said defendant, to wit:

FIRST. Insufficiency of the evidence to justify the verdict, in that there were no testimony tending to show that the defendant, Al Weathers, was at the place where the attempted robberies are alleged to have been committed at the time of the alleged commission thereof.

SECOND. Error in law occurring at the trial and *accepted* to by the defendant in the admission of the testimony of Alfred Knutson, Henry Alexander, Dr. W. A. Borland, John Hanson, F. J. Ferguson, Homer Lee, Herman Mitts, Andy Abrahamson, Arvid Johnson, Ted Liknes, concerning the commission of offenses other than those for which the defendant was then on trial.

THIRD. Error in law committed by the Court

in refusing to grant defendant's motion to strike the testimony of John Hanson, Homer Lee, F. J. Ferguson, Dr. W. A. Borland, and that portion of the testimony of Alfred Knutson, referring to incidents alleged to have occurred on the 10th day of July, 1919, and all the testimony given on behalf of the plaintiff with reference to the commission of offenses other than those committed on the eighth day of July, for which offense the defendant was then on trial.

O. P. HUBBARD,
HENRY RODEN,
Attorneys for Defendant.

Receipt of true copy of foregoing motion acknowledged this 20th day of February, 1920.

JAMES A. SMISER,
U. S. Attorney. [311]

And thereafter, to wit, on the 1st day of March, 1920, the Court overruled said motion, filing herein its written opinion; and thereafter, on the 6th day of March, 1920, entered judgment and sentence as appears by the records of the court. [312]

[Caption and Title.]

Order Settling Bill of Exceptions.

United States of America,
Territory of Alaska.

I, the undersigned, presiding Judge at the trial of the above-entitled cause, do hereby certify that the above and foregoing contains a full, true and accurate transcript of all the testimony adduced and

heard at the trial thereof on the issues joined, with the objections and exceptions of the defendant to the reception and rejection of evidence, the charge of the Court to the jury, the motion for new trial and all other matters and things occurring thereat and not otherwise of record.

And I now sign and allow the same as and for a true and correct bill of exceptions of all matters contained therein, and order the same to be filed and when so filed to be and become a part of the record in this cause.

Dated at Juneau, Alaska, this 15th day of April, 1920.

ROBERT W. JENNINGS,
District Judge.

Filed in the District Court, District of Alaska,
First Division. Apr. 15, 1920. J. W. Bell, Clerk.
By ———, Deputy. [313]

[Caption and Title.]

Regular January Term, 1920.

Verdict.

We, the jury impaneled and sworn in the above-entitled cause, find the defendant Al Weathers guilty as charged in Counts Two and Three of Indictment, and Not Guilty as charged in Count One thereof, and we recommend clemency of the Court on account of defendant's youth.

Dated at Juneau, Alaska, this 18 day of February, 1920.

C. J. SKUSE,
Foreman.

Filed in the District Court, District of Alaska, First Division. Feb. 18, 1920. J. W. Bell, Clerk. By John T. Reed, Deputy. 9:50 A. M.

Entered Court Journal No. H, page 178. [314]

In the District Court for the District of Alaska,
Division Number One.

No. 1346-B.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

AL WEATHERS,
Defendant.

Judgment and Sentence.

This cause comes on regularly at this time for the imposition of sentence upon the above-named defendant, Al Weathers, on the verdict of guilty of the violation of Section 1898, Compiled Laws of Alaska, as charged in Counts two (2) and three (3) of the indictment herein (assault with intent to commit robbery), rendered by the jury herein on the 18th day of February, 1920. The defendant appears in court, in person, on obedience to his bail herein, and is also represented by his attorneys, O. P. Hubbard and Henry Roden, Esquires. The

plaintiff is represented by James A. Smiser, Esquire.

Thereupon the defendant is asked by the Court if he has any reason to offer why the judgment and sentence of the Court should not now be imposed upon him, and the defendant not offering any valid or sufficient reason,

It is the JUDGMENT of the Court that said defendant, Al Weathers, is guilty of the violation of Section 1898, Compiled Laws of Alaska, and it is the SENTENCE of the Court that said Al Weathers, be taken by the United States Marshal for the District of Alaska, Division Number One thereof, to the United States Penitentiary at McNeil Island, in the State of Washington, and there delivered to the warden of said institution, and that he be imprisoned in said penitentiary for the period of four (4) years, and that he stand committed until this sentence is fully executed.

Done in open court this 6th day of March, 1920.

ROBERT W. JENNINGS,

District Judge.

Filed in the District Court, District of Alaska, First Division. Mar. 6, 1920. J. W. Bell, Clerk.
By ———, Deputy. [315]

[Caption and Title.]

Petition for Writ of Error.

To the Honorable Justices of the United States Circuit Court of Appeals for the Ninth Circuit, and the Honorable ROBERT W. JENNINGS, Judge of the District Court for the District of Alaska, First Judicial Division.

Comes now Al Weathers, defendant below and plaintiff in error, and complains that in the record and proceedings had in the said action, and also in the rendition of the sentence and judgment in the above-entitled action in the said District Court, at the October term, 1919, thereof against the said defendant below and plaintiff in error, Al Weathers, on the 6th day of March, 1920, manifest error having happened to the great damage of the said defendant below and plaintiff in error, whereof the said defendant below and plaintiff in error prays the Honorable Judges for the allowance of a writ of error, and for an order fixing the amount of bond to cover costs and damages in the said action, and for such other orders and process as may cause the same to be corrected by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 15th day of April, 1920.

O. P. HUBBARD,
HENRY RODEN,

Attorneys for Defendant Below and Plaintiff in Error.

Allowed.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska,
First Division. Apr. 15, 1920. J. W. Bell, Clerk.
By ———, Deputy. [316]

[Caption and Title.]

**Order Allowing Writ of Error and Fixing Amount
of Bond.**

Defendant below and plaintiff in error having this day filed his petition for a writ of error from the decision and judgment made and entered herein, together with an assignment of errors, and also praying that an order be made fixing the amount of security which said defendant below and plaintiff in error should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this court be suspended and stayed until the determination of said writ of error by the Circuit Court of Appeals and said petition having been duly allowed:

It is now ordered that upon said defendant below and plaintiff in error filing a good and sufficient bond in the sum of six thousand dollars, to the effect that he will abide by and perform the orders of this court and the orders and judgment of the said appellate court, and on his failure to do so that the signers of said bond will pay to the United States the said sum above mentioned, which said bond shall be approved by this Court and when said bond is given and approved all proceedings under

the said judgment and sentence appealed from by this writ of error shall be stayed until the determination of the said writ of error by the United States Circuit Court of Appeals for the Ninth Judicial Circuit and in the meantime as long as the conditions of said bond are complied with the defendant shall be allowed to go at large.

Dated this 15th day of April, 1920.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Apr. 16, 1920. J. W. Bell, Clerk.
By —————, Deputy.

Entered Court Journal No. H, page 230. [317]

[Caption and Title.]

Assignment of Errors.

Comes now Al. Weathers, defendant below and plaintiff in error in this action, in connection with his petition for a writ of error, and makes the following assignment of errors which he avers occurred upon the trial of this cause, to wit:

1.

The Court erred in admitting the evidence of the witness Alfred Knutsen,, who testified to seeing the gas-boat "Diana" on the 10th day of July, 1919, being two days after the crime alleged to have been committed by the defendant herein was committed, and particularly to that portion of the evidence of said Alfred Knutsen, as follows:

"Q. What was your purpose in wanting to hail it?

A. I recognized that was the same boys (boat) that was shooting at us before.

Mr. HUBBARD.—I don't believe that testimony is admissible. He is asking what his purpose was in hailing the boat on the 10th and it is incompetent and irrelevant so far as the issues in this indictment are concerned.

Mr. SMISER.—No, it is not, in my judgment.

Mr. HUBBARD.—It might come in later on in rebuttal but at this time it is not admissible.

The COURT.—I do not see how it can possibly injure anybody—it is only an explanation of what he was doing himself, and it does not connect the defendant in any way as yet. I think he may testify what his purpose was, and if the defendant is not connected with it in any way it will be stricken.

Q. What was your purpose in hailing her, Captain?

A. The purpose was, I recognized her to be the same boat.

Mr. HUBBARD.—I thought the Court ruled that he could not answer the question as to his purpose.

The COURT.—The objection is overruled—he may testify what his purpose was.

Mr. HUBBARD.—Exception.

Q. Did you know what the name of the boat was at this time?

A. I didn't see the name on her, no.

Q. You didn't know at that time and you

wanted to find out what the name of it was, was that it?

A. Yes, I wanted to see the name of it.

Q. You wanted to see the name of it and that is the reason you hailed [318] it, as you recognized it as the boat that did the shooting and you wanted to see the name of the boat, is that it?

Mr. HUBBARD.—I object to that—the witness has not stated that.

The COURT.—No, he did not say that—do not lead the witness.

Q. (By Mr. SMIZER.) The question was what was your purpose in hailing the boat and going up close to it,—what did you do that for?

A. I wanted to get up close and see the name of it.

Q. Why did you want to see the name of that boat?

A. I recognized it to be the same boat that was up there the 8th.

Q. That shot at you?

A. The 8th.

Q. Now, what did you do in order to hail it?

A. I changed my course.

Q. Well, what did you do with your scow?

A. I dropped the scow—left the scow—dropped the scow. * * *

Q. Now, when you approached the boat what did it do?

A. Well, after they run a little while they turned right around.

Mr. HUBBARD.—If the Court please, I think he has now stated what his purpose was, and what he accomplished. Now he is testifying to what the boat did.

The COURT.—That is the very object of the testimony, to find out what the boat did—not what he did. The very object of this testimony is to show what the boat that he recognized as being the boat that fired the shots did.

Mr. HUBBARD.—We wish to object to any testimony as to what it did as being incompetent, irrelevant and immaterial in this case at this time, what the boat did. The purpose, we understood, was that he wanted to identify the boat.

The COURT.—The objection is overruled.

Mr. HUBBARD.—The defendant saves an exception to the ruling of the Court. To the introduction of which the defendant objected which objection was overruled by the Court and an exception was allowed.”

2.

The Court erred in admitting the testimony of the witness W. A. Borland, who testified to seeing the boat “Diana” several days after the occurrence for which the defendant was on trial in this court, and that he saw the defendant upon the said day on the said gas-boat at a place some twenty miles distant from the scene where the offense is alleged to have been committed, and particularly to that portion of said testimony being as follows:

“(By Mr. SMISER.)

Q. Please state your name.

A. W. A. Borland.

Q. Where do you live? A. Hoonah.

Q. What is your business?

A. Physician.

Q. Do you practice medicine at Hoonah?

A. Yes, sir.

Q. Do you occupy any office there?

A. Yes sir; commissioner.

Q. United States Commissioner?

A. Yes, sir.

Q. Where were you on the 10th of July, 1919?

A. Well, I left the cannery on a boat bound for Admiralty Island.

Q. What boat?

A. The 'Forrester.' [319]

Q. Who was captain of the boat?

A. Knutsen.

Q. In making the trip I will ask you whether you encountered another boat or saw another boat. A. Yes, sir.

Q. I will ask you what you did with reference to that boat after seeing it.

Mr. HUBBARD.—We will reserve an exception to this testimony as not being competent. It in no way tends to prove any of the allegations in the three counts of the indictment here—it is not relevant.

The COURT.—The objection will be overruled provided the defendant is connected with it.

Mr. HUBBARD.—This witness does not claim to have been at Admiralty Cove at the

time of the original transaction at all, which has been testified to by the other witnesses.

The COURT.—The defendant would not have to be connected by this witness.

Mr. HUBBARD.—I reserve an exception to the testimony of the witness on this question.

A. One of the men came and reported to the Captain,—

Mr. HUBBARD.—I object to that, if the Court please.

Q. (By Mr. SMISER.) Just tell what was done.

A. They changed their course and followed the boat.

Q. About how far off would say the boat was at that time—at the time they changed their course and followed?

A. Two and one-half or three miles—something like that.

Q. How long did they continue to follow it?

A. Well, I think it was over an hour, perhaps something like that.

Q. Did the 'Forerster' boat have anything with it at that time? A. Had a scow.

Q. What was done with reference to the scow?

A. Well, after they had followed the boat a considerable time, they were not making very much headway, and Captain Knutson dropped the scow.

Q. Then what did they do?

A. As soon as the scow was dropped, we had probably gone a few hundred yards when the

boat that we were following turned and came back across the bow of the 'Forrester.'

Q. Came back across the bow of the 'Forrester.'

A. Yes.

Q. Now, describe what transpired between the two boats from there on.

A. Captain Knutson stopped the 'Forrester', and the boat we were following turned across the bow and then stopped, and the men came out and covered up the name on the bow.

Q. What boat are you speaking of?

A. The 'Diana.'

Q. Is that the boat you had sighted?

A. That we were following, yes, sir?

Q. Go ahead—the men came out and did what?

A. They dropped a canvas over the name on the boat—or covered—I don't know whether it was canvas or not, and came out and placed up something against the gunwale of the boat—a square, I should judge, $2\frac{1}{2}$ or 3 feet square, and a man came out of the pilot-house with a gun, and one went up the forecandle and the other was on the back of the pilot-house.

Q. How many men did you see?

A. I saw two at the time on the 'Diana.'

Q. I will ask you if anything was said by the men on the 'Diana' at that time?

A. Yes, they hollered, 'Come on, you square heads.' [320]

Q. Hollered, 'Come on you square heads.'

A. Yes, sir.

Q. Was that at the time you saw the man with the gun? A. Just about that.

Q. Now, when Captain Knutson saw that what did he do?

A. Got scared, become frightened, turned the boat around, said, 'They are going to shoot,' and started away.

Q. Now, I will ask you if you know the defendant, Al Weathers? A. Yes, sir.

Q. I will ask you if you recognized the men on the boat at that time?

A. He was the only man I recognized, yes, sir.

Q. You recognized him? A. Yes, sir.

Q. Yes,—well, he was the man who came out of the pilot-house with the gun; at the time he came out I didn't recognize him as being Al Weathers, but he was the tall one.

Q. Now, do you know Al Weathers' voice?

A. Well, yes, I do.

Q. I will ask you whether or not at that time you recognized his voice?

A. I thought I did at the time, yes, sir."

To the introduction of which the defendant objected, which objection was by the Court overruled and an exception allowed.

3.

The Court erred in admitting the testimony of the witness Iver Stenzo, and particularly that portion of the testimony of the said witness referring to matters occurring prior to the time upon which the offense alleged in the indictment herein was committed, and particularly that portion of the testi-

mony of the said witness reading and being as follows:

“Q. I will ask you whether you were at Admiralty Cove about the middle of June.

A. Yes, I was there.

Q. I will ask you whether or not any trap was robbed at that time? A. Yes, there was.

Q. What trap?

A. The Bay trap and the floating-trap No. 4.
[321]

Q. Do you know whether they had fish in them at that time?

A. Yes, they had a few.

Q. Do you know how many?

A. About 200 I think in the Bay trap.”

Mr. HUBBARD.—If the Court please, we desire to save an exception to this testimony with reference to the 16th, that he is testifying to.

The COURT.—The testimony is admitted Mr. Smizer, on your promise to connect it—if it is not connected it will be stricken.

Mr. SMIZER.—I think we will do that satisfactorily, your Honor.

The COURT.—Very well. It will be admitted, subject to a motion to strike later on if counsel thinks it is not connected.

Q. About how many fish were in No. 4 at that time? A. I don't know.

Q. What boat—did you recognize the boat?

A. Yes, it seemed to be the same boat.

Q. What boat was that?

A. The ‘Diana.’

Q. I will ask you if you were there on June 10th? A. Yes, I was.

Q. I will ask you if any trap was robbed on that occasion?

A. Yes; No. 1 was robbed.

Q. What time did that occur?

A. I don't know; it was in the night-time.

Mr. HUBBARD.—We reserve our exception to this testimony, the same as the others, if the Court please—we do not think it is material or competent in this case.

The COURT.—The ruling will be the same.

Q. Did you see that boat on that occasion?

A. No.

Q. All you know about this particular instance is that the trap was robbed on this particular date? A. Yes.

Mr. HUBBARD.—Now, if the Court please, we will move to strike out his testimony—he said he didn't see the boat.

The COURT.—The District Attorney does not have to connect it with this witness. When the Government's testimony is closed if it is not connected then is the time to make your motion to strike it out. He does not have to connect it by this one witness—he may have some other witness to connect it by—I cannot tell.

Mr. HUBBARD.—We will keep our exception until later."

4.

The Court erred in admitting the testimony of the witness John Hanson in which said witness testified

to having seen the boat “Diana” on other occasions and at various times, other than the time when the offense alleged in the indictment was committed, and particularly that portion of said witnesses’ testimony which is as follows:

“Q. I will ask you if anything occurred on the night of the 30th of June there at your trap?

A. Yes.

Q. What occurred. [322]

Mr. HUBBARD.—The evidence is not admissible. It is a transaction that occurred on the 30th day of June at a point a long distance from where the transaction took place which we are trying. It is not in any way connected with the case which is on trial, and there is nothing that connects it up in any way with that transaction. The evidence is inadmissible—it is incompetent, irrelevant and immaterial as to this case, and has a tendency to prejudice the minds of the jury.

The COURT.—I think, Mr. Smiser, that I indicated what my ruling is on these matters. If you can connect this boat with any similar offense—holding up traps—it would be evidence of intent and purpose, but if this witness’ testimony is not any more connecting than the last witness’ testimony—

Mr. SMISER.—Well, it is.

The COURT.—I would have sustained an objection to the last witness’ testimony—I would have stricken it out if the motion had been made because that witness could not identify the boat

and did not identify any men that were on it. Unless this witness can identify the boat, or identify the men, or connect it in some other way, the objection will be well taken.

Mr. SMIZER.—I think it will be fully identifies, your Honor.

The COURT.—Very well, I will admit it subject to a motion to strike it when the testimony is finished.

Mr. HUBBARD.—We understand that as far as the testimony of the last witness is concerned it is subject to your Honor's ruling that if it isn't connected the motion to strike will be sustained. It might still be connected by other witnesses—it is true that the last witness did not identify it—it might be connected by some other witness, but if it is not we propose when the Government has its case in to make our motion. * * *

Q. Go ahead and tell what happened.

A. Well, I came something about halfway and I heard the noise of a bullet some place nearby me.

Mr. HUBBARD.—If the Court please, it seems to me that before the witness testifies to any more detail he should be asked whether he recognized that boat or recognized the parties on it.

Mr. SMIZER.—I will ask that at the proper time.

The COURT.—I have indicated what the ruling will be—if it is not connected it will be stricken.

Mr. HUBBARD.—If the Court please, the witness has testified that he saw a boat. Now, he knows whether or not he recognized that boat, and if he knows that boat, or if he saw any of the parties there he can testify that he recognized them. If he did the testimony might go in, but to put in a lot of detail here of something that transpired before it is identified to the jury—

The COURT.—If he does not identify the boat it does not hurt you in any way whatsoever. How can it hurt you?

Mr. HUBBARD.—I do not know that it would, if the Court please.

The COURT.—If he does not know anything about what boat it was, or cannot identify the boat or the parties on it, it does not hurt you; consequently let counsel develop his case the way he wants to, then if it is not connected it will be stricken out. I cannot direct him as to what order he shall put his testimony in. [323]

Mr. HUBBARD.—I am inclined to think, if your Honor please, that testimony of this kind does have a tendency to hurt, even if it is afterward stricken out. We will save an exception to the testimony.

The COURT.—Proceed. * * *

Q. (By Mr. SMISER.) Now, I will ask you if you saw that boat that they tied up to that trap at that time—did you see the boat?

A. I saw the boat, yes.

Q. Do you know what boat that was?

A. No, not at that time.

Q. Well, did you afterwards in any way find out what it was?

A. Well, they took us into town here and we found a boat by the dock down here on Front street that seemed to be like it.

Q. I will ask you whether or not you recognized it as the same boat?

Mr. HUBBARD.—Now, if the Court please, I think I will object to the testimony. The witness has stated that he did not recognize the boat at that time.

The COURT.—I know, Mr. Hubbard, but you might see a thing at one time and then see it at another time and know it was the same thing.

Mr. HUBBARD.—He might come to the conclusion that the boat he saw several weeks later was the same boat, but his testimony is being admitted on the ground that he identify the boat.

The COURT.—He does not have to identify it at that time.

Mr. HUBBARD.—We will save an exception to the testimony on that ground, if the Court please, and on the further ground that the boat at the time it was recognized as he said it was in the hands of the United States Marshal and had been illegally seized by the United States Marshal.

The COURT.—What effect would that have?

Mr. HUBBARD.—I simply want to save an exception.

The COURT.—Very well.

Q. (By Mr. SMISER.) I will ask you whether or not you recognized it as the same boat, speaking at the time you came into Juneau here and saw the boat 'Diana'—I ask you if you recognized it as the same boat that was out at your trap on the 30th of June?

A. I would say it looks like that boat.

Q. Now, at the time you saw the boat at Juneau were there any other boats around except that, or was that the only one there?

A. Around our trap?

Q. No, was there any other boat, when you went to look at the boat at Juneau, the boat that you said looked like the one that was at your trap, were there any other boats around the dock at that time, or only the boat you were looking at?

A. No, I couldn't see any other looks like that boat—that was the nearest I could see around there.

Q. Were there any other boats that did not look like it?

Mr. HUBBARD.—Let me understand—he said, 'Yes, it looked the nearest like that of any,' he saw.

Mr. SMISER.—Suppose he did say it—what of it.

Mr. HUBBARD.—I want to understand what he said.

The COURT.—Yes that is what he said.

Q. Now, were there any other boats there when you were looking at it to find out what

boat it was—were there any other boats around there? [324]

A. Yes, there was—there was many boats around there. * * *

Mr. HUBBARD.—Now, if the Court please, I will move at this point to strike out the testimony of the witness on the ground that he has not identified the boat.

The COURT.—I think, Mr. Smiser, if that is as far as this witness can go, that it looked nearer like it than any other boat he saw, that it is not sufficiently connected.

Q. (By Mr. SMIZER.) Please make it as plain as you can whether this in your opinion was the same boat that was at your trap on the 30th of June.

Mr. HUBBARD.—If the Court please, I think I will object to that—the witness has testified.

The COURT.—Overruled.

A. I say it looks like it, the nearest I could see of all them boat around—the shape of the boat and the mast, and it looked almost the same.

Q. Can you state whether in your opinion it was the same boat or not?

Mr. HUBBARD.—Now, if the Court please, I will object to that question. The witness has stated that it looked like it, and it was the nearest of any boat there like it.

The WITNESS.—I couldn't swear to it it was the same boat.

Mr. HUBBARD.—Now, he is asking him to

give an opinion about it and he has stated the facts.

The COURT.—The last part of your objection is well taken first part is not. He cannot give his opinion—he can give his judgment. Now, I will ask this question—I know that you cannot swear positively that it was the same boat, but please state whether or not in your judgment it was the same boat.

A. It was—yes, it was, in my judgment.

Mr. HUBBARD.—We save an exception to that. The witness has stated that he could not swear to it, and it isn't now a question of his judgment and it isn't a question of his opinion.

The COURT.—Well, I am rather inclined to think that is well taken. He has testified that it looks like the boat but he couldn't swear to it. Now, that can go to the jury for what it is worth.

Q. Now, I will ask you, Mr. Hanson, whether you could tell at the time you heard these shots being fired from what direction they were coming?

A. Well, they came from the trap so far as we could judge it.

Q. It came from the trap?

A. From the trap, yes.

Q. Was that the trap where the boat was?

A. Yes, sir.

Mr. HUBBARD.—If the Court please, I do not like to keep interrupting all the time, but I object to it because it is immaterial. He has said he could not identify the boat.

The COURT.—He has identified it in a way, and I said it can go to the jury for what it is worth. I shall instruct the jury what all this evidence is admitted for—I can cover it by my instructions, I think. The objection is overruled.” [325]

5.

The Court erred in overruling the motion of defendant to strike out the testimony of the witnesses John Hanson and Homer Lee given in plaintiff's case in chief, for the reason that the evidence of said witnesses failed to in any way connect the defendant with the commission of any offense, which motion being by the Court denied, was duly excepted to and an exception allowed.

6.

The Court erred in overruling defendant's motion to strike all the testimony given by the witness, Dr. W. A. Borland, relating to matters and things occurring long after the commission of the offenses set up in the indictment, which motion, being by the Court denied, was duly excepted to and an exception allowed.

7.

The Court erred in overruling defendant's motion to strike all that portion of the testimony given by the witness, Alfred Knutson, referring to incidents happening on the 10th day of July, 1919, and long after the commission of the offenses set up in the indictment herein, which motion, being by the Court denied, was duly excepted to and an exception allowed.

8.

The Court erred in overruling defendant's motion to strike all the testimony given on behalf of plaintiff referring to matters and things and offenses committed on other days than the 8th day of July, 1919, that being the time definitely fixed by the witnesses for the plaintiff when the offenses set up in the indictment herein were committed, which motion was denied by the Court, to which ruling the defendant excepted and an exception was allowed.

9.

The Court erred in overruling defendant's motion for new trial to which ruling the defendant excepted and an exception was allowed. [326]

10.

The Court erred in pronouncing sentence and judgment against the defendant.

WHEREFORE the defendant below and plaintiff in error prays that the judgment of the District Court may be reversed.

O. P. HUBBARD,

HENRY RODEN,

Defendant's Attorneys.

Service of copy of within assignment of errors is hereby admitted this —— day of April, 1920.

JAMES A. SMIZER,

U. S. Attorney.

Filed in the District Court, District of Alaska, First Division. April 15, 1920. J. W. Bell, Clerk.
By ———, Deputy. [327]

[Caption and Title.]

Writ of Error.

The President of the United States to the Honorable,
the Judge of the District Court for the District
of Alaska, Division Number One, GREETING:

Because in the record and proceedings, as also in the rendition of sentence and judgment of a plea which is in said District Court before you, between The United States of America, plaintiff, and Al Weathers, defendant and plaintiff in error, as by his complaint appears.

We, being willing that said error, if any have been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if the judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 14th day of June, 1920, in the said Circuit Court of Appeals to be then and there heard, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done thereof to correct that error, what of right and according to law and custom of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE,
Chief Justice of the Supreme Court of the United

States of America, this 15th day of April, 1920.

Allowed.

ROBERT W. JENNINGS,
District Judge.

Filed in the District Court, District of Alaska,
First Division. Apr. 15, 1920. J. W. Bell, Clerk.
By —————, Deputy. [328]

[Caption and Title.]

Citation.

To James A. Smiser, United States District Attorney,
District of Alaska, Division Number One,
GREETING:

You are hereby cited and admonished on behalf of the plaintiff in error, Al Weathers, to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, in the State of California, on the 14th day of June, 1920, pursuant to a writ of error filed in the office of the clerk of the District Court for the District of Alaska, Division Number One, wherein Al Weathers is plaintiff in error and the United States of America is defendant in error, to show cause, if any there be, why the sentence and judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the plaintiff in error in that behalf.

Dated and done in open court this 15th day of April, 1920.

ROBERT W. JENNINGS,
Judge of the District Court for the District of Alaska,
Division Number One.

Service admitted this 15th day of April, 1920.

JAMES A. SMISER,
United States District Attorney, District of Alaska,
Division Number One.

Filed in the District Court, District of Alaska,
First Division. Apr. 15, 1920. J. W. Bell, Clerk.
By _____, Deputy. [329]

[Caption and Title.]

Stipulation as to Printing Record.

It is stipulated between the attorneys for the parties respectively, that in printing the record in this case for use in the United States Circuit Court of Appeals for the Ninth Circuit, all captions should be omitted after the title of the cause has been once printed, and the words "Caption and Title" and the name of the paper or document should be substituted therefor; also, that after printing the indorsements and file-marks on the indictment, bill of exceptions, record in the Appellate Court, the indorsements other than file-marks on all other papers should be omitted, and the word "Indorsements" printed in lieu thereof.

All other parts of the record should be printed,

Dated this 17th day of April, 1920.

O. P. HUBBARD,

HENRY RODEN,

Attorneys for Plaintiff in Error.

JAMES L. BACKSTROM,

Asst. United States District Attorney, for the Defendant in Error.

Filed in the District Court, District of Alaska,
First Division. April 17, 1920. J. W. Bell, Clerk.
By —————, Deputy. [330]

[Caption and Title.]

Praecipe for Transcript of Record.

The clerk of the above-entitled court will please prepare and certify a copy of the record in this action as follows:

1. Indictment.
2. Bill of exceptions.
3. Verdict.
4. Judgment.
5. Petition for writ of error.
6. Order allowing writ of error, and fixing amount of supersedeas bond.
7. Assignment of error.
8. Writ of error.
9. Citation.
10. Stipulation as to printing record.
11. This praecipe.
12. Order extending return day of writ of error.

O. P. HUBBARD,

HENRY RODEN,

Attorneys for Defendant or Plaintiff in Error.

Service admitted this 17th day of April, 1920.

JAMES L. BACKSTROM,
Asst. United States Attorney.

Filed in the District Court, District of Alaska,
First Division. April 17, 1920. J. W. Bell, Clerk.
By ———, Deputy. [331]

[Caption and Title.]

Order Extending Return Day of Writ of Error.

Upon application of the defendant below and plaintiff in error, and for good cause shown,—

IT IS ORDERED that the return day of the writ of error allowed in this case on the 15th day of May, 1920, be extended to the 15th day of June, 1920.

Dated this 17th day of April, 1920.

ROBERT W. JENNINGS,
District Judge.

Copy received and service admitted this 17th day of April, 1920.

JAMES L. BACKSTROM,
Asst. United States Attorney.

Filed in the District Court, District of Alaska,
First Division. April 17, 1920. J. W. Bell, Clerk.
By ———, Deputy. [332]

[Caption and Title.]

**Order Extending Time to and Including August 15,
1920, to File Transcript of Record.**

Now, at this day, comes the United States of Amer-

ica by Assistant United States District Attorney, J. L. Backstrom, and the defendant, Al Weathers, by O. P. Hubbard, of counsel, and thereupon this cause comes on to be heard upon the motion of said defendant for the extension of time in which to file the transcript herein in the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing to the Court from the statement of the clerk of this court that the *addition* time is required in which to prepare the transcript for filing in the said Circuit Court of Appeals, it is ordered that the time heretofore granted in which to file said transcript in said United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby extended to August fifteenth, 1920.

Dated this fifteenth day of June, A. D. 1920.

ROBERT W. JENNINGS,

Judge.

Entered Court Journal No. H, page 240.

Filed in the District Court, District of Alaska, First Division. Jun. 15, 1920. J. W. Bell, Clerk. By ———, Deputy. [333]

[Caption and Title.]

Order Extending Time to and Including August 25, 1920, to File Transcript of Record.

Now, at this date, comes the United States of America by James A. Smiser, United States District Attorney, and the defendant, Al Weathers, by O. P. Hubbard, of counsel, and thereupon this cause comes on

to be heard upon the motion of said defendant for an extension of time in which to file the transcript herein in the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing to the Court from the statement of counsel for the defendant and from the clerk of this court that the transcript of the record has just been completed, and that additional time is required in which to prepare the transcript for filing in the said Circuit Court of Appeals, it is ordered that the time heretofore granted in which to file said transcript in said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, be and the same is hereby extended to August twenty-fifth, A. D. 1920.

Dated this fifth day of August, 1920.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska, First Division. Aug. 5, 1920. J. W. Bell, Clerk.
By _____, Deputy.

Entered Court Journal No. H, page 289. [333½]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
District of Alaska,
Division No. 1,—ss.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that

the foregoing and hereto attached 333 pages of type-written matter, numbered from one to 333½, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe of attorneys for defendant and plaintiff in error, on file in my office and made a part hereof, in Cause No. 1346-B, wherein the United States of America is plaintiff and defendant in error and Al Weathers is defendant and plaintiff in error.

I further certify, that the said record is by virtue of the writ of error and citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate amounting to one hundred fifty-three and 45/100 dollars (\$153.45) has been paid to me by counsel for plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 16th day of August, 1920.

[Seal]

J. W. BELL,
Clerk.

By _____,
Deputy.

[Endorsed]: No. 3544. United States Circuit Court of Appeals for the Ninth Circuit. Al Weathers, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon

Writ of Error to the United States District Court of
the District of Alaska, Division No. 1.

Filed August 24, 1920.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

AL WEATHERS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

FILED
OCT 21 1920
F. D. MONCKTON,
CLERK

O. P. HUBBARD,
HENRY RODEN,
Juneau, Alaska,
Counsel for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

Cause No. 3544.

AL WEATHERS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error.

STATEMENT OF CASE.

On the 9th day of September, 1919, the defendant, Al Weathers, together with Ike Weathers and Ernest Stage, was indicted by the United States Grand Jury at Juneau, Alaska. The indictment (pp. 1-6, Transcript) was in three counts, for alleged violation of the provisions of sections 1897 and 1898, Compiled Laws of Alaska, 1913. The trial of the defendant began on the —— day of February, 1920, and on the 18th day of February, 1920, the jury returned a verdict of guilty, under counts 2 and 3 of the indictment and not guilty, under count 1, with a recommendation for clemency of the Court on account of defendant's youth (pp. 371, 372, Transcript).

On the 20th day of February, 1920, defendant filed his motion for a new trial (pp. 372, 373, Transcript),

which motion was denied by the Court on the 1st day of March, 1920 (p. 373, Transcript). On the 6th day of March, 1920, judgment was entered on the verdict and the defendant sentenced to four years in the United States Penitentiary, at McNeil Island (pp. 375, 376, Transcript). On the 15th day of April, 1920, petition for writ of error was allowed (pp. 377, 378, Transcript), and on the 16th day of April, an order allowing the writ of error and fixing the bond in the amount of Six Thousand (\$6,000.00) Dollars, (pp. 378, 379, Transcript). On the 15th day of April, 1920, defendant filed his assignment of errors (pp. 379-397, Transcript), as follows:

ASSIGNMENT OF ERRORS.

Comes now Al. Weathers, defendant below and plaintiff in error in this action, in connection with his petition for a writ of error, and makes the following assignment of errors which he avers occurred upon the trial of this cause, to wit:

1.

The Court erred in admitting the evidence of the witness Alfred Knutsen, who testified to seeing the gas-boat "Diana" on the 10th day of July, 1919, being two days after the crime alleged to have been committed by the defendant herein was committed, and particularly to that portion of the evidence of said Alfred Knutsen, as follows:

"Q. What was your purpose in wanting to hail it?

"A. I recognized that was the same boys [boat] that was shooting at us before.

Mr. HUBBARD.—I don't believe that testimony is admissible. He is asking what his purpose was in hailing the boat on the 10th and it is incompetent and irrelevant so far as the issues in this indictment are concerned.

Mr. SMISER.—No, it is not, in my judgment.

Mr. HUBBARD.—It might come in later on in rebuttal but at this time it is not admissible.

The COURT.—I do not see how it can possibly injure anybody—it is only an explanation of what he was doing himself, and it does not connect the defendant in any way as yet. I think he may testify what his purpose was, and if the defendant is not connected with it in any way it will be stricken.

Q. What was your purpose in hailing her, Captain?

A. The purpose was, I recognized her to be the same boat.

Mr. HUBBARD.—I thought the Court ruled that he could not answer the question as to his purpose.

The COURT.—The objection is overruled—he may testify what his purpose was.

Mr. HUBBARD.—Exception.

Q. Did you know what the name of the boat was at this time? A. I didn't see the name on her; no.

Q. You didn't know at that time and you wanted to find out what the name of it was, was that it?

A. Yes, I wanted to see the name of it.

Q. You wanted to see the name of it and that is the reason you hailed [318] it, as you recognized it as the boat that did the shooting and you wanted to see the name of the boat, is that it?

Mr. HUBBARD.—I object to that—the witness has not stated that.

The COURT.—No, he did not say that—do not lead the witness.

Q. (By Mr. SMIZER.) The question was what was your purpose in hailing the boat and going up close to it,—what did you do that for?

A. I wanted to get up close and see the name of it.

Q. Why did you want to see the name of that boat?

A. I recognized it to be the same boat that was up there the 8th.

Q. That shot at you? A. The 8th.

Q. Now, what did you do in order to hail it?

A. I changed my course.

Q. Well, what did you do with your scow?

A. I dropped the scow—left the scow—dropped the scow. . . .

Q. Now, when you approached the boat what did it do?

A. Well, after they run a little while they turned right around.

Mr. HUBBARD.—If the Court please, I think he has now stated what his purpose was, and what he accomplished. Now, he is testifying to what the boat did.

The COURT.—That is the very object of the testimony, to find out what the boat did—not what he did. The very object of this testimony is to show what the boat that he recognized as being the boat that fired the shots did.

Mr. HUBBARD.—We wish to object to any testimony as to what it did as being incompetent, irrele-

vant and immaterial in this case at this time, what the boat did. The purpose, we understood, was that he wanted to identify the boat.

The COURT.—The objection is overruled.

Mr. HUBBARD.—The defendant saves an exception to the ruling of the Court. To the introduction of which the defendant objected which objection was overruled by the Court and an exception was allowed.”

2.

The Court erred in admitting the testimony of the witness W. A. Borland, who testified to seeing the boat “Diana” several days after the occurrence for which the defendant was on trial in this Court, and that he saw the defendant upon the said day on the said gas-boat at a place some twenty miles distant from the scene where the offense is alleged to have been committed, and particularly to that portion of said testimony being as follows:

“(By Mr. SMISER.)

Q. Please state your name.

A. W. A. Borland.

Q. Where do you live? A. Hoonah.

Q. What is your business? A. Physician.

Q. Do you practice medicine at Hoonah?

A. Yes, sir.

Q. Do you occupy any office there?

A. Yes, sir; commissioner.

Q. United States Commissioner? A. Yes, sir.

Q. Where were you on the 10th day of July, 1919?

A. Well, I left the cannery on a boat bound for Admiralty Island.

Q. What boat?

A. The 'Forrester.' [319]

Q. Who was captain of the boat?

A. Knutsen.

Q. In making the trip I will ask you whether you encountered another boat or saw another boat?

A. Yes, sir.

Q. I will ask you what you did with reference to that boat after seeing it.

Mr. HUBBARD.—We will reserve an exception to this testimony as not being competent. It in no way tends to prove any of the allegations in the three counts of the indictment here—it is not relevant.

The COURT.—The objection will be overruled provided the defendant is connected with it.

Mr. HUBBARD.—This witness does not claim to have been at Admiralty Cove at the time of the original transaction at all, which has been testified to by the other witnesses.

The COURT.—The defendant would not have to be connected by this witness.

Mr. HUBBARD.—I reserve an exception to the testimony of the witness on this question.

A. One of the men came and reported to the Captain,—

Mr. HUBBARD.—I object to that, if the Court please.

Q. (By Mr. SMISER.) Just tell what was done.

A. They changed their course and followed the boat.

Q. About how far off would say the boat was at that time—at the time they changed their course and followed?

A. Two and one-half or three miles—something like that.

Q. How long did they continue to follow it?

A. Well, I think it was over an hour, perhaps something like that.

Q. Did the 'Forrester' boat have anything with it at that time? A. Had a scow.

Q. What was done with reference to the scow?

A. Well, after they had followed the boat a considerable time, they were not making very much headway, and Captain Knutson dropped the scow.

Q. Then what did they do?

A. As soon as the scow was dropped, we had probably gone a few hundred yards when the boat that we were following turned and came back across the bow of the 'Forrester.'

Q. Came back across the bow of the 'Forrester.'

A. Yes.

Q. Now, describe what transpired between the two boats from there on.

A. Captain Knutson stopped the 'Forrester,' and the boat we were following turned across the bow and then stopped, and the men came out and covered up the name on the bow.

Q. What boat are you speaking of?

A. The 'Diana.'

Q. Is that the boat you had sighted?

A. That we were following? Yes, sir.

Q. Go ahead—the men came out and did what?

A. They dropped a canvas over the name on the boat—or covered—I don't know whether it was canvas or not, and came out and placed up something against the gunwale of the boat—a square, I should judge, $2\frac{1}{2}$ or 3 feet square, and a man came out of the pilot-house with a gun, and one went up the fore-castle and the other was on the back of the pilot-house.

Q. How many men did you see?

A. I saw two at the time on the 'Diana.'

Q. I will ask you if anything was said by the men on the 'Diana' at that time?

A. Yes, they hollered, 'Come on, you square heads.'

[320]

Q. Hollered, 'Come on, you square heads'?

A. Yes, sir.

Q. Was that at the time you saw the man with the gun? A. Just about that.

Q. Now, when Captain Knutson saw that what did he do?

A. Got scared, become frightened, turned the boat around, said 'They are going to shoot,' and started away.

Q. Now, I will ask you if you know the defendant, Al Weathers? A. Yes, sir.

Q. I will ask you if you recognized the men on the boat at that time?

A. He was the only man I recognized, yes, sir.

Q. You recognized him? A. Yes, sir.

Q. Yes,—well, he was the man who came out of the pilot-house with the gun; at the time he came

out I didn't recognize him as being Al Weathers, but he was the tall one.

Q. Now, do you know Al Weathers' voice?

A. Well, yes, I do.

Q. I will ask you whether or not at that time you recognized his voice?

A. I thought I did at the time, yes, sir."

To the introduction of which the defendant objected, which objection was by the Court overruled and an exception allowed.

3.

The Court erred in admitting the testimony of the witness Iver Stenzo, and particularly that portion of the testimony of the said witness referring to matters occurring prior to the time upon which the offense alleged in the indictment herein was committed, and particularly that portion of the testimony of the said witness reading and being as follows:

"Q. I will ask you whether you were at Admiralty Cove about the middle of June.

A. Yes, I was there.

Q. I will ask you whether or not any trap was robbed at that time?

A. Yes, there was.

Q. What trap?

A. The Bay trap and the floating-trap No. 4. [321]

Q. Do you know whether they had fish in them at that time?

A. Yes, they had a few.

Q. Do you know how many?

A. About 200, I think, in the Bay trap.

Mr. HUBBARD.—If the Court please, we desire to save an exception to this testimony with reference to the 16th, that he is testifying to.

The COURT.—The testimony is admitted, Mr. Smiser, on your promise to connect it—if it is not connected it will be stricken.

Mr. SMISER.—I think we will do that satisfactorily, your Honor.

The COURT.—Very well. It will be admitted, subject to a motion to strike later on if counsel thinks it is not connected.

Q. About how many fish were in No. 4 at that time?

A. I don't know.

Q. What boat—did you recognize the boat?

A. Yes, it seemed to be the same boat.

Q. What boat was that?

A. The 'Diana.'

Q. I will ask you if you were there on June 10th?

A. Yes, I was.

Q. I will ask you if any trap was robbed on that occasion?

A. Yes; no, I was robbed.

Q. What time did that occur?

A. I don't know; it was in the night-time.

Mr. HUBBARD.—We reserve our exception to this testimony, the same as the others, if the Court please—we do not think it is material or competent in this case.

The COURT.—The ruling will be the same.

Q. Did you see that boat on that occasion?

A. No.

Q. All you know about this particular instance is that the trap was robbed on this particular date?

A. Yes.

Mr. HUBBARD.—Now, if the Court please, we will move to strike out his testimony—he said he didn't see the boat.

The COURT.—The District Attorney does not have to connect it with this witness. When the Government's testimony is closed if it is not connected then is the time to make your motion to strike out. He does not have to connect it by this one witness—he may have some other witness to connect it by—I cannot tell.

Mr. HUBBARD.—We will keep our exception until later.

4.

The Court erred in admitting the testimony of the witness John Hanson in which said witness testified to having seen the boat "Diana" on other occasions and at various times, other than the time when the offense alleged in the indictment was committed, and particularly that portion of said witness' testimony which is as follows:

"Q. I will ask you if anything occurred on the night of the 30th of June there at your trap?

A. Yes.

Q. What occurred? [322]

Mr. HUBBARD.—The evidence is not admissible. It is a transaction that occurred on the 30th day of June at a point a long distance from where the transaction took place which we are trying. It is not in any way connected with the case which is on trial, and there is nothing that connects it up in any way with that transaction. The evidence is inadmissi-

ble—it is incompetent, irrelevant and immaterial as to this case, and has a tendency to prejudice the minds of the jury.

The COURT.—I think, Mr. Smiser, that I indicated what my ruling is on these matters. If you can connect this boat with any similar offense—holding up traps—it would be evidence of intent and purpose, but if this witness' testimony is not any more connecting than the last witness' testimony—

Mr. SMISER.—Well, it is.

The COURT.—I would have sustained an objection to the last witness' testimony—I would have stricken it out if the motion had been made because that witness could not identify the boat and did not identify any men that were on it. Unless this witness can identify the boat, or identify the men, or connect it in some other way, the objection will be well taken.

Mr. SMISER.—I think it will be fully identified, your Honor.

The COURT.—Very well, I will admit it subject to a motion to strike it when the testimony is finished.

Mr. HUBBARD.—We understand that as far as the testimony of the last witness is concerned it is subject to your Honor's ruling that if it isn't connected the motion to strike will be sustained. It might still be connected by other witnesses—it is true that the last witness did not identify it—it might be connected by some other witness, but if it is not we propose when the Government has its case in to make our motion. . . .

Q. Go ahead and tell what happened.

A. Well, I came something about halfway and I heard the noise of a bullet some place near by me.

Mr. HUBBARD.—If the Court please, it seems to me that before the witness testifies to any more detail he should be asked whether he recognized that boat or recognized the parties on it.

Mr. SMISER.—I will ask that at the proper time.

The COURT.—I have indicated what the ruling will be—if it is not connected it will be stricken.

Mr. HUBBARD.—If the Court please, the witness has testified that he saw a boat. Now, he knows whether or not he recognized that boat, and if he knows that boat, or if he saw any of the parties there he can testify that he recognized them. If he did the testimony might go in, but to put in a lot of detail here of something that transpired before it is identified to the jury—

The COURT.—If he does not identify the boat it does not hurt you in any way whatsoever. How can it hurt you?

Mr. HUBBARD.—I do not know that it would, if the Court please.

The COURT.—If he does not know anything about what boat it was, or cannot identify the boat or the parties on it, it does not hurt you; consequently let counsel develop his case the way he wants to, then if it is not connected it will be stricken out. I cannot direct him as to what order he shall put his testimony in. [323]

Mr. HUBBARD.—I am inclined to think, if your Honor please, that testimony of this kind does have

a tendency to hurt, even if it is afterward stricken out. We will save an exception to the testimony.

The COURT.—Proceed. . . .

Q. (By Mr. SMISER.) Now, I will ask you if you saw that boat that they tied up to that trap at that time—did you see the boat?

A. I saw the boat; yes.

Q. Do you know what boat that was?

A. No, not at that time.

Q. Well, did you afterwards in any way find out what it was?

A. Well, they took us into town here and we found a boat by the dock down here on Front Street that seemed to be like it.

Q. I will ask you whether or not you recognized it as the same boat?

Mr. HUBBARD.—Now, if the Court please, I think I will object to the testimony. The witness has stated that he did not recognize the boat at that time.

The COURT.—I know, Mr. Hubbard, but you might see a thing at one time and then see it at another time and know it was the same thing.

Mr. HUBBARD.—He might come to the conclusion that the boat he saw several weeks later was the same boat, but his testimony is being admitted on the ground that he identified the boat.

The COURT.—He does not have to identify it at that time.

Mr. HUBBARD.—We will save an exception to the testimony on that ground, if the Court please, and on the further ground that the boat at the time

it was recognized as he said it was in the hands of the United States Marshal and had been illegally seized by the United States Marshal.

The COURT.—What effect would that have?

Mr. HUBBARD.—I simply want to save an exception.

The COURT.—Very well.

Q. (By Mr. SMISER.) I will ask you whether or not you recognized it as the same boat, speaking at the time you came into Juneau here and saw the boat 'Diana'—I ask you if you recognized it as the same boat that was out at your trap on the 30th of June?

A. I would say it looks like that boat.

Q. Now, at the time you saw the boat at Juneau were there any other boats around except that, or was that the only one there?

A. Around our trap?

Q. No; was there any other boat, when you went to look at the boat at Juneau, the boat that you said looked like the one that was at your trap, were there any other boats around the dock at that time, or only the boat you were looking at?

A. No, I couldn't see any other looks like that boat—that was the nearest I could see around there.

Q. Were there any other boats that did not look like it?

Mr. HUBBARD.—Let me understand—he said, 'Yes, it looked the nearest like that of any,' he saw.

Mr. SMISER.—Suppose he did say it—what of it.

Mr. HUBBARD.—I want to understand what he said.

The COURT.—Yes, that is what he said.

Q. Now, were there any other boats there when you were looking at it to find out what boat it was—were there any other boats around there? [324]

A. Yes, there was—there was many boats around there. . . .

Mr. HUBBARD.—Now, if the Court please, I will move at this point to strike out the testimony of the witness on the ground that he has not identified the boat.

The COURT.—I think, Mr. Smiser, if that is as far as this witness can go, that it looked nearer like it than any other boat he saw, that it is not sufficiently connected.

Q. (By Mr. SMISER.) Please make it as plain as you can whether this in your opinion was the same boat that was at your trap on the 30th of June.

Mr. HUBBARD.—If the Court please, I think I will object to that—the witness has testified.

The COURT.—Overruled.

A. I say it looks like it, the nearest I could see of all them boat around—the shape of the boat and the mast, and it looked almost the same.

Q. Can you state whether in your opinion it was the same boat or not?

Mr. HUBBARD.—Now, if the Court please, I will object to that question. The witness has stated that it looked like it, and it was the nearest of any boat there like it.

The WITNESS.—I couldn't swear to it it was the same boat.

Mr. HUBBARD.—Now, he is asking him to give an opinion about it and he has stated the facts.

The COURT.—The last part of your objection is well taken, first part is not. He cannot give his opinion—he can give his judgment. Now, I will ask this question—I know that you cannot swear positively that it was the same boat, but please state whether or not in your judgment it was the same boat.

A. It was—yes, it was, in my judgment.

Mr. HUBBARD.—We save an exception to that. The witness has stated that he could not swear to it, and it isn't now a question of his judgment and it isn't a question of his opinion.

The COURT.—Well, I am rather inclined to think that is well taken. He has testified that it looks like the boat but he couldn't swear to it. Now, that can go to the jury for what it is worth.

Q. Now, I will ask you, Mr. Hanson, whether you could tell at the time you heard these shots being fired from what direction they were coming?

A. Well, they came from the trap so far as we could judge it.

Q. It came from the trap?

A. From the trap, yes.

Q. Was that the trap where the boat was?

A. Yes, sir.

Mr. HUBBARD.—If the Court please, I do not like to keep interrupting all the time, but I object to it because it is immaterial. He has said he could not identify the boat.

The COURT.—He has identified it in a way, and I said it can go to the jury for what it is worth. I shall instruct the jury what all this evidence is ad-

mitted for—I can cover it by my instructions, I think. The objection is overruled.” [325]

5.

The Court erred in overruling the motion of defendant to strike out the testimony of the witnesses John Hanson and Homer Lee given in plaintiff's case in chief, for the reason that the evidence of said witnesses failed to in any way connect the defendant with the commission of any offense, which motion being by the Court denied, was duly excepted to and an exception allowed.

6.

The Court erred in overruling defendant's motion to strike all the testimony given by the witness, Dr. W. A. Borland, relating to matters and things occurring long after the commission of the offenses set up in the indictment, which motion, being by the Court denied, was duly excepted to and an exception allowed.

7.

The Court erred in overruling defendant's motion to strike all that portion of the testimony given by the witness, Alfred Knutson, referring to incidents happening on the 10th day of July, 1919, and long after the commission of the offenses set up in the indictment herein, which motion, being by the Court denied, was duly excepted to and an exception allowed.

8.

The Court erred in overruling defendant's motion to strike all the testimony given on behalf of plaintiff referring to matters and things and offenses

committed on other days than the 8th day of July, 1919, that being the time definitely fixed by the witnesses for the plaintiff when the offenses set up in the indictment herein were committed, which motion was denied by the Court, to which ruling the defendant excepted and an exception was allowed.

9.

The Court erred in overruling defendant's motion for new trial, to which ruling the defendant excepted and an exception was allowed. [326]

10.

The Court erred in pronouncing sentence and judgment against the defendant.

WHEREFORE the defendant below and plaintiff in error prays that the judgment of the District Court may be reversed.

O. P. HUBBARD,

HENRY RODEN,

Defendant's Attorneys.

Service of copy of within assignment of errors is hereby admitted this —— day of April, 1920.

JAMES A. SMISER,

U. S. Attorney.

Filed in the District Court, District of Alaska, First Division. April 15th, 1920. J. W. Bell, Clerk. By ———, Deputy. [327]

Defendant further assigns as error in this case the failure of the Government to prove the allegation of the indictment that the alleged crime of assault with intent to commit robbery was committed within the District of Alaska, and within the jurisdiction of the District Court, and second, the failure of the Govern-

ment to prove that the Hoonah Packing Company is a corporation duly organized and existing as such as alleged in said indictment, in counts 2 and 3 of said indictment.

On the 16th day of February, 1920, the Government having closed its case, and Mr. Smiser, the United States District Attorney, having stated to the Court, "We rest" (p. 287, Transcript), the defendant filed his written motion to strike the testimony of certain witnesses, as follows:

"In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 1346-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AL WEATHERS,

Defendant.

Motion to Strike.

Comes the defendant and respectfully moves the Court to strike from the record herein the testimony of the following named witnesses, to wit:

The testimony of John Hanson and Homer Lee for the reason that neither of said two witnesses identified either the boat 'Diana' or the defendant at any time testified to by them or either of them.

All the testimony of Dr. Boarland for the reason that said testimony has no bearing upon any of the issues in this case; the same refers to incidents

occurring on the 10th day of July, 1919, long after the commission of the offense for which the defendant is now on trial, and does not tend to establish the commission thereof.

That portion of the testimony of Alfred Knutson referring to incidents happening on the 10th day of July, 1919, for the reason that said testimony concerns incidents long after the commission of the offense for which defendant is being tried, and such testimony does not tend to establish the commission of the offense charged in the indictment.

The testimony of Carl Peterson for the reason that said testimony has no probative force, and does not identify either the defendant or the boat 'Diana.'

All the testimony given on behalf of the plaintiff with reference to the commission of offenses other than on the 8th day of July, for which latter offense the defendant is now on trial, for the reason that all such evidence and testimony is incompetent and irrelevant and does not tend to establish any of the constitutive elements of the offense charged; that there is no causal or logical or natural connection between the act for which the defendant is now being tried and the acts testified to by said witnesses and attempted to be established by such evidence; that the admission of such evidence compels the defendant to meet charges of which the indictment gives him no notice or information; that it raises a variety of issues and tends to confuse and to divert the attention of the jury from the charge upon which the defendant is being tried and the

same does not tend to establish any element of the offense charged.

O. P. HUBBARD,

HENRY RODEN,

Attorneys for Defendant.

Filed in the District Court, District of Alaska, First Division. Feb. 16, 1920. J. W. Bell, Clerk. By John T. Reed, Deputy."

The above and foregoing motion appears at page 287, Transcript.

STATEMENT OF CASE.

The indictment, counts 2 and 3, charge an offense committed under section 1898, Compiled Laws of Alaska, 1913, as follows:

"That whoever assaults another with intent to kill or to commit rape or robbery upon the person so assaulted, shall be imprisoned in the penitentiary not more than fifteen years or less than one year."

The indictment charges that the crime was committed on the 8th day of July, 1919, at Admiralty Cove, within the District of Alaska, and within the jurisdiction of the court.

The evidence of the Government developed the following situation:

That on the morning of 8th of July, 1919, at about 5 o'clock, a small boat was seen proceeding in a southerly direction on Chatam Strait, of which Admiralty Cove is an indentation of the coast. The said boat was passing along outside of certain fish-traps, designated in the testimony as Admiralty Trap, No. 1, Bay Trap, and Floating Trap,

No. 4. Evidence is also given as to a trap called the Hawk Inlet Trap. The boat, it is testified to by several of the Government witnesses, slowed down as it passed the trap designated as Floating Trap, No. 4. One witness testified that it made a turn there. The boat then proceeded around a point of land to the southward in the direction of Hawk Inlet. Two of the Government witnesses, Swan Swanson and Henry Alexander, testified that they saw the boat as it passed on its course toward Hawk Inlet, that immediately thereafter they got their rifles and their ammunition and took a position near the lead of Floating Trap, No. 4, that they were in this position when a small boat, the witnesses claiming that it was the same boat, that had passed before, again appeared from the Hawk Inlet point of land on a course that would take it near to where a cannery tender belonging to the Hoonah Packing Company was tied to a dolphin.

These two Government witnesses testified that shots were fired from the small boat which was approaching prior to the time that it reached a point outside of the Floating Trap and at a time when the boat was about one thousand feet (1,000) from the trap. They testified to having heard the shots but did not testify to having seen anyone on the small boat doing any firing. They simply testify that shots were heard as they say coming from the small boat.

Henry Alexander testified that he could see where the shots were striking and that it was on the water near the "Forrester."

The two witnesses, Henry Alexander and Swan Swanson, testified that, at this time, they began firing at the small boat from their position on the shore where they were concealed either behind rocks or trees. They testified to firing about forty shots at the small boat. This was the beginning of the trouble on the morning of the 8th of July, at Admiralty Cove. It is apparent from the evidence that shooting had occurred from the shore as well as from the small boat prior to the time when Alfred Knutson, the party upon whom the assault is said to have been made, came upon the scene as he testifies, and that when he heard shooting, he got up. He was sleeping in a stateroom on the "Forrester"—a cannery tender belonging to the Hoonah Packing Company—when he heard the shooting; he testifies he got up, that he looked out through the window of the pilot-house and saw a small boat out beyond the Bay Trap; that he went out on deck and that afterwards shots were fired which he testifies passed across the "Forrester," and one of which he says came very near to him; in fact, he fixes it as four inches from his head and says it knocked him down, and that he fell on the deck.

Another witness, Sofus Ellison, testifies that he was in the pilot-house, having been called up by Knutson, and that he, too, heard shots which passed over the boat, and he further testifies that one shot struck in the mast of the "Forrester"; that he afterwards picked up the bullet which dropped on the deck.

Other witnesses who were on shore—trap watchmen—testify that they were called out after the shooting began and concealed themselves behind a barricade or log protection in front of their cabin. These witnesses testify that the small boat from which they say shots were fired was the “Diana.”

There is no evidence by any witness for the Government that the defendant Al Weathers was on the boat which the Government witnesses say they identified as the “Diana” at the time of the alleged shooting.

There is no testimony on the part of the Government that any attempt was made to take fish either from the scow or from either one of the traps. On the contrary, the testimony is that the small boat after having passed down to a point directly in front of the Bay Trap turned out to sea and soon disappeared.

The evidence of the Government witnesses establishes the fact that when the shooting took place, beyond the Floating Trap, No. 4, the small boat was at least four thousand five hundred feet from the “Forrester”; that the nearest the small boat approached to the “Forrester” was three thousand to four thousand feet, although Captain Knutson testifies in his direct testimony that he thought the distance was about two thousand feet, but admitted on cross-examination that he had stated on a former examination that it was three to four thousand feet, and that he probably remembered more accurately at that time, as it was nearer to the occurrence.

This was the situation on the morning of the 8th of July, as disclosed by the witnesses of the Government. On the facts as so disclosed and stated an indictment was returned against the defendant charging him in the first count with maliciously shooting at Alfred Knutson with the intent to kill, wound or maim the said Knutson, and in the second count with having assaulted Alfred Knutson by shooting at him with the intention to rob the said Knutson of certain fish, then and there in the fish-traps heretofore described, and in the third count, the defendant was charged with having assaulted Alfred Knutson by shooting at him with a rifle with the intention of taking, stealing and carrying away certain fish from the scow in the possession of the said Knutson.

The Government witnesses testify that there were fish in the scow; they do not testify that there were any fish in the traps on the morning of the 8th of July. The defendant was acquitted by the jury on the charge in the first count.

The scow referred to in the indictment and testified to by the Government witnesses, was lying alongside of the tender, between the tender and a small boat said to have been firing the shots, and it was testified by the witnesses that the scow was a little shorter than the tender itself, but somewhat higher than the tender, out of the water, except that part of the tender described as the pilot-house. The pilot-house was probably a few feet higher than the scow. The testimony of the Government witnesses is that on the tender, at the time

of the alleged assault, there were thirteen men. Of these Alfred Knutson and Sofus Ellison alone testify in this case. No explanation is given by the Government for not calling the other witnesses to this most important part of the alleged crime.

After the facts as stated above were testified to by the Government witnesses Alfred Knutson, Sofus Ellison, Swan Swanson, Henry Alexander, Andrew Abrahamson and Herman Mitts, as to the occurrence on the 8th of July, the Government introduced testimony from the same witnesses, not including Knutson and Ellison, as to alleged trap-lifting on the 5th of July, on the 29th of June, and on the 17th of June. The same witnesses testify that on these several occasions they had recognized the boat "Diana" as being the boat committing the alleged depredations.

One witness Henry Alexander, testified that on one occasion he recognized a voice which he said was that of the defendant.

Alfred Knutson and Dr. W. A. Boarland testify to a transaction which occurred in Icy Strait. This was on the 10th of July. The witnesses testify that they were coming from the Hoonah cannery and were on their way to Admiralty Cove, on the cannery tender "Forrester," and that they saw a small boat out on the strait three or four miles from them and passing on an opposite course.

The witnesses testify that they gave chase to this boat and pursued it for more than an hour in an attempt to overtake it.

Dr. Boarland testifies that they were all armed, but does not testify that they intended to make an attack upon the small boat. He does state, however, that the captain became scared and turned about. It would seem from his testimony that they had some purpose that was not well intended or friendly to the small boat.

At this time there were thirteen men on the cannery tender, "Forrester," and again we have only two witnesses testifying to the occurrence, Alfred Knutson, and the captain and Dr. Boarland, both closely associated with the Hoonah Packing Company and in its employ.

The Government then introduced in evidence and was permitted by the Court to introduce in evidence the testimony of John Hanson, Homer Lee, J. H. Ferguson and Ted Likeness, as to other offenses alleged to have been committed on the 30th of June, and on the night of the 7th or morning of the 8th of July. These occurrences were testified to by the witnesses to have taken place at points as from twenty to sixty miles from Admiralty Cove.

It was to the admission of the testimony of these witnesses, and the other Government witnesses to transactions or occurrences or alleged offenses at other times and places not charged in the indictment, that the plaintiff objected and that plaintiff contends was prejudicial error on the part of the Court to admit said testimony.

The Government failed to establish by evidence that the crime charged was within the District of Alaska, or within the jurisdiction of the Court.

It also failed to establish by the evidence that the Hoonah Packing Company is a corporation.

The defendant proved by unimpeached testimony that he was not at Admiralty Cove on the morning of the 8th of July or on the morning of the 5th of July.

ARGUMENT.

The general rule is that, on a prosecution for a particular crime, evidence which in any manner shows or tends to show that accused has committed another crime wholly independent of that for which he is on trial, even though it is a crime of the same sort is irrelevant and inadmissible. The foregoing statement of the general rule is taken from 16 Corpus Juris, section 1132, K., p. 586. In connection with the above statement of the general rule the authorities are cited. The rule extends to proof of an accusation of another crime as well as to evidence of its actual commission.

In a note under the above section, it is said:

“This is but the reiteration of a still more general rule, that in all cases, civil or criminal, the evidence must be confined to the point in issue.”

People vs. King, 276 Ill. 138, 145, 114 N. E. 601.

In another note under the same section, it is stated:

“The rule is founded in reason. The defendant comes to the trial, prepared to meet only the crime with which he is accused, and he cannot from the nature of things, be pre-

pared to defend against other crimes that may be charged against him. Moreover, it is not the policy of the law to convict a man of one crime by showing that he has, at some time, been guilty of another."

State vs. Eder, 36 Wash. 482, 484, 78 P. 1023.

"The rule therefore rests upon two grounds: first, the impropriety of inferring from the commission of one crime that the defendant is guilty of another, and, second, the Constitutional objection to compelling a defendant to meet charges of which the indictment gives no information."

State vs. Hyde, 234 Mo. 200, 225, 136 S. W. 316.

In the same note it is stated, that:

"Where positive evidence has been introduced by the state, evidence of extraneous and contemporary crimes is not admissible."

Gardner vs. State, 55 Tex. Cr. 400, 117 S. W. 148.

The same authority at section 1133, p. 587, in referring to the exceptions to the rule, states:

"The admission of evidence which shows or tends to show the commission of other offenses by accused has been and should be carefully restricted."

Effler vs. State, 27 Del. 62, 85 Atl. 731.

"While there are several well-recognized exceptions to the rule excluding evidence of other offenses, and these exceptions are

founded on as much wisdom and justice as the rule itself, the rule should be strictly enforced, and should not be departed from except under conditions which clearly justify such a departure.”

In *Coble vs. State*, 31 Ohio, 100, it is decided that on the trial of an indictment for assault with intent to rob, evidence tending simply to show an attack of like character, committed by the defendant upon another person and at another time and place, is inadmissible. The facts stated in the case cited are somewhat like the facts in the case under consideration and the authorities seem to be directly in point.

In *State vs. Spray* (Mo. 74 S. W. 846), which was a trial for robbery, it is held, as in the Ohio case, that the evidence of another offense of the same character is not admissible. It is stated in the Missouri case that the testimony of a separate offense must have some tendency to prove the charge in the indictment. It is admissible only on the ground that it has some logical connection with the offense proposed to be proven. It is further stated in *State vs. Spray*, that “The general rule as to the admission of testimony of the commission of offenses other than the one charged is that it is inadmissible. The rule is very tersely stated by Mr. Bishop in his new criminal procedure. He says: ‘The state cannot prove against a defendant any crime not alleged, either as foundation for a separate punishment, or as aiding the

proofs that he is guilty of the one charge, even though he has put his character in issue.' ”

In the same case the following language is found: “From the instruction of the Court given in this case, it appears this testimony was admitted for the purpose of showing intent. This was error. The facts constituting the offense and the very act itself, as shown by the prosecuting witness, were sufficient evidence of the intent. The act of defendant, if he committed it, needed no explanation to indicate intent. The act itself carried the intent with it. . . . Upon the trial of a person charged with assault to rob, it is not competent for the state, in aid of the prosecution to prove other assaults committed by the defendant, whether with or without intent—citing *Coble vs. State*, 31 Ohio State.”

In support of the general rule and of the contention of the defendant in this case that the testimony of Dr. W. A. Boarland, John Hanson, Homer Lee, Arvid Johnson, Ted Likeness, J. H. Ferguson, and such portions of the testimony of Alfred Knutson, Ivar Stenso, Swan Swanson, Andrew Abrahamson, and Henry Alexander, as did not pertain to the occurrence on the morning of the 8th of July, was improperly admitted and is prejudicial error in the case, we cite the following cases:

Coble vs. State, 31 Ohio State, p. 100.

State vs. Spray, 74 S. W. 846.

State vs. Hyde, 234 Mo. 200, 225, 136 S. W. 316.

State vs. Lapage, 57 N. H. 245, 24 A. 69.

People v. Minney, 155 Mich. 534, 119 N. W. 918.

People v. Molineux, 168 N. Y. 264, 62 L. R. A. 193.

People v. Grutz, 212 N. Y. 72, 105 N. E. 843.
Ruling Case Law, p. 198, sec. 194.

Ruling Case Law, p. 206, secs. 200, 201.

If, as contended by the plaintiff in error, the admission of the testimony of the witnesses above named was prejudicial, we understand it to be the rule that the reviewing court may presume that such error was prejudicial, unless the record shows the contrary.

Armour & Company vs. Russell, 144 Fed. 614.

We respectfully submit that the case should be reversed and sent back for retrial, on the grounds and reasons set forth in the foregoing brief.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

AL WEATHERS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Upon Writ of Error to the United States District Court for the
District of Alaska, Division No. 1.

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CLERK

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Juneau, Alaska,
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United States
Circuit Court of Appeals
For the Ninth Circuit.

Cause No. 3544.

AL WEATHERS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Defendant in Error

STATEMENT OF FACTS IN SHORT.

This is one of a number of cases originally brought against Al Weathers, Ike Weathers and Ernest Stage for a number of larcenies and robberies of certain fish-traps situated on the shores of Southeastern Alaska. On the trial there was a severance demanded and the Government chose to try the case against Ernest Stage first, he having made a confession of substantially all the charges in the various indictments. He was accordingly tried and convicted on the charges in the indictment in the present case. He did not appeal. Later the defendant Al Weathers was put upon trial and was thereafterward found guilty by the

jury and was regularly sentenced to a term of four years' imprisonment.

Thereafter, all the other cases against all the defendants were dismissed upon motion of the district attorney, they being substantially the other cases concerning which proof had been admitted in the case at bar.

It is claimed on behalf of the Government that the case at bar is one of a series of cases in which these three men conspired to rob fish-traps, and for this purpose, to assault the trapmen or trap-tenders by shooting at them, thereby putting them in fear and thus to carry out their scheme of robbery. The specific acts covered by the charges in this indictment were the assaulting and shooting at Captain Knutson and others with the intent of killing or putting them in fear and thereby robbing them of certain fish loaded in a scow and in certain fish-traps, in charge of said Knutson and others, all of which were at the time situated at Admiralty Cove, on the shore of Admiralty Island, within the District of Alaska.

The proof showed that Al Weathers was the owner and master of the boat "Diana." The three jointly operated the boat. On July 8th, 1919, at about 5 o'clock A. M., this boat came into Admiralty Cove and shot many volleys of shots from rifles at the boat "Forester," and those thereon, of which boat Captain Knutson was in charge. A number of bullets struck the boat and scow lying alongside of it, and one bullet passed within four inches of Captain Knutson's head, and another

struck the mast and fell upon the deck, and many others fell in the water near the boat. But at this time some of the trapmen on shore began to fire upon the "Diana," and she turned her course and escaped without getting any fish either from the scow or the traps.

We take it that it would be unnecessary to go into all of the details of the evidence at this time, but suffice it to say that there was left no room for doubt that the defendant, Al Weathers, was one of the parties on the boat on this occasion when this assault was made, and participated therein. This, of course, was the main question presented to the jury, and upon which a verdict of guilty was rendered. We believe that the proof was overwhelming and amply sustains the finding of the jury.

To reverse this finding the appellant has assigned ten alleged errors.

I.

It is assigned as error that the court permitted witness Knutson to testify that on July 10, 1919, he hailed the boat "Diana" for the reason that he recognized it as the boat which had assaulted him two days previous thereto.

This was objected to by defendant, but the Court allowed the evidence. This could in no wise hurt the defendant, as was remarked by the Trial Court. It was simply explaining the action of the witness in hailing the boat, and certainly can be no grounds for assigning error. No objection was made until after the same had been answered.

Hence, objection came too late. Besides, the question was competent.

See Transcript, pp. 22, 23.

The next question asked the witness was: "Did you know what the name of the boat was at this time?" To which the witness answered: "I didn't see the name on her; no."

This question and answer were not objected to at the time.

See Transcript, pp. 24, 25.

And therefore cannot now be objected to or assigned as error. The question was competent.

The next question asked the witness was not objected to and was answered, and therefore cannot now be assigned as error.

Further, neither of said last two questions were open to objection—both were competent and relevant.

The next question was leading, and the Court so ruled and no answer was given to it.

The next question was: "The question was, what was your purpose in hailing the boat and going up close to it. What did you do that for?"

Answer: "I wanted to get up close and see the name of it."

No objection was made to this question and answer at the time, and hence cannot now be made.

See Transcript, pp. 24, 25.

Besides, we insist that the question was competent and proper. No reason was then given, nor is any now given why it was not a proper

question. Several questions and answers follow without objection or exception.

Transcript, p. 25.

Then the question: "Now, when you approached the boat, what did it do?" The witness answered it by saying: "Well, after they run a little while they turned right round."

This was answered without any objection by defendant's counsel until after the answer had been fully given. Then after it was given fully counsel objected. The objection came too late. It should have been made before answer.

Transcript, p. 25.

Besides that, no reason was given why the question was improper. For, indeed, it was not improper or subject to exception.

Thereafter, the witness was further examined as to the actions of the boat "Diana" on that occasion and he detailed certain happenings in regard thereto, told about the boat coming toward his own boat and the men on the "Diana" getting their guns and setting up some square plates against the boat railing, etc., and to none of this evidence was any objection offered.

Transcript, pp. 26, 27, 28, 29.

An objection to evidence must be made at the time it is offered and not after answer. It is then too late. But even after the objections above referred to were made, counsel for defendant proceeded to cross-examine the witness upon all of said matters concerning which said objections had been

made. See Transcript, pages 43 to 48, in which defendant brought out substantially all the same facts to which he had objected. He thereby waived his objections and cannot now complain at their introduction. Besides this, we insist that the evidence was competent and admissible.

II.

As to the second assignment, which was to Dr. Borland's testimony, it will be noted that no objection was made to any question or answer until the question was asked: "I will ask you what you did with reference to that boat [the "Diana"] after seeing it?"

Transcript, p. 74 (near middle).

To this question counsel for defendant objected (see Transcript, pp. 74 and 75); the objection was overruled by the Court. The witness then started to make reply by stating what someone reported to the captain, but upon objection by counsel for defendant did not state what was reported, and was thereupon directed by the district attorney to "Just tell what was done." The witness answered: "They [meaning those on the "Forester"] changed their course and followed the boat."

The above referred to objection made by counsel for defendant was absolutely the only objection offered by defendant to the testimony of Dr. Borland, and his examination proceeded at some length thereafter.

Transcript, pp. 75-78.

After Dr. Borland had finished his examination in chief, he was cross-examined by counsel for defendant at great length and in detail concerning the very facts and circumstances which are objected to and which are now assigned as error. In said cross-examination Dr. Borland reiterated said facts and circumstances.

See Transcript, pp. 79-93.

By so doing we insist that defendant waived any grounds of objection to any such matters, and is now estopped from assigning the same as error.

We further insist, however, that said objections were not well founded, in the first place, and that said testimony was admissible, and that no error was committed in its admission.

III.

The third assignment of error is based upon certain questions asked Ivan Stenso.

Transcript, pp. 104, 105.

After the questions had been answered by the witness, counsel for defendant interposed a general objection, stating no reasons why the same should be allowed. The Court admitted the same, subject to be stricken if at the close of the Government's case no connection had been shown with the defendant, this witness further on having testified in plain terms that it was the boat "Diana"

Transcript, p. 105,

and another witness on the same point, to wit, Andrew Abrahamson, having testified to the same facts as to the boat "Diana," and further as to the

identity of Al Weathers, counsel for the defendant did not further rely upon said objections as shown by his motion filed after the Government had closed its case. See

Transcript, pp. 287, 288.

The same is shown by motion for new trial filed by defendant.

Transcript, pp. 372, 373.

He therefore cannot assign this as error.

IV.

The fourth assignment of error deals with the admission of the evidence of John Hanson as to the robbery of the fish-trap on June 30, 1919.

This was objected to, for the reason, as alleged, it was concerning matters which occurred prior to the matters complained of in the indictment, and in no way connected therewith.

Transcript, pp. 196, 197.

We here call the attention of this court to the ruling of the Trial Court, on the admission of this testimony. How carefully he guarded the rights of defendant. How he explained that this evidence would be competent only in case it should be properly connected up. See Court's rulings as set out in

Transcript, pp. 196, 197, 198, 199, 200, 201.

Note Hanson's identification of the boat "Diana."

Transcript, pp. 205, 206, 207, 208.

While this was not identifying the boat with absolute certainty, yet it did in a way do so, and under the limitations of the Court as expressed

in his rulings, it was allowed to be presented to the jury for what it was worth. Note, too, Hanson's statements as to the identity of the men on the boat with that of the three defendants.

Transcript, p. 203.

But further connection and identification of these occurrences on June 30th is made by Homer Lee, Hanson's co-trap watchman, and by J. H. Ferguson, watchman on adjoining trap.

Transcript, pp. 223, 224, 229, 231, 232, 233.

V.

The fifth assignment of error deals with the admission of the evidence of said John Hanson and Homer Lee, and alleges that the same should have been rejected, "because the witnesses failed in any way to connect the defendant with the commission of any offense," etc.

We submit that said testimony, especially when taken in connection with that of J. H. Ferguson, does fully show the commission of a similar offense by defendant to that charged in the indictment, and for this reason was competent and admissible.

VI and VII.

The sixth and seventh assignments of error deal with the admission of the testimony of Captain Knutson and Dr. Borland as to what occurred on July 10, 1919, near the Sisters Island when they hailed the boat "Diana."

This date, it is true, was two days after the crime charged in the indictment. But the facts proven are not for the purpose of showing any other similar crime or any crime at all, so far as that is con-

cerned. It was simply to show what was done to identify the boat as the boat "Diana," which had committed the assault on July 8th. The boat had been recognized as the same boat, and they wanted to further investigate and learn the name of the boat and who was in charge of the same. This certainly was the natural, legitimate and proper thing to do.

The actions of the defendant on that occasion and his statements were certainly competent and admissible in evidence. The voluntary acts and statements of defendants are always admissible in evidence against them, whether before or after the commission of a criminal act, provided, of course, if they are material and go to explain their actions at the time of the commission of the act charged in the indictment.

VIII.

The eighth assignment of error deals with defendant's motion to strike *all* of the testimony given on behalf of the Government referring to matters occurring on other days than on July 8, 1919.

This motion deals with the testimony of John Hanson, Homer Lee and the testimony of Dr. Borland and Captain Knutson as to what happened on July 10, 1919, and the testimony of Carl Peterson, because, as alleged, "said testimony has no probative force, and does not identify either the defendant or the boat 'Diana'."

The motion also asks that all the testimony on behalf of the Government with reference to commission of offenses other than on July 8th be ex-

cluded, because, as alleged, it is incompetent, for the reasons assigned in the motion.

Transcript, pp. 287, 288.

See ruling of the Court in regard thereto.

Transcript, pp. 288, 289.

We insist that the court made no error in overruling said motion. In the first place, said motion was entirely too broad and general to specify any particular error. In the second place, it was not well taken, because said evidence was all competent and relevant and admissible. The legal reasons for this will be given in later portions of this brief.

IX.

The ninth assignment of error is based upon the Court's refusal to grant a new trial.

Transcript, pp. 272, 273.

This motion is substantially based on the same grounds as the former motion and has no merit.

1. The first ground for said motion was for insufficiency of evidence. Our contention is that the evidence was entirely sufficient to warrant the jury in finding a verdict of guilty. In fact, the jury would have stultified themselves to have found otherwise. It is true that an *alibi* was relied upon, but this was a question for the jury. It will be noted that while the defendant did not take the stand, he did introduce certain witnesses to attempt to prove an *alibi*. But some of these witnesses had been buying the fish which defendant was accused of stealing, and one witness Bennett had in all probability been a partner of defendant, at least

had an agreement to dispose of the fish, and for these reasons evidently the jury were warranted in disbelieving them. The other witnesses on this point, for various reasons, as shown by their cross-examinations, were not believed by the jury.

We understand that this Court will not disturb the findings of a jury on the grounds of insufficiency of evidence unless there be an entire lack of evidence on some material point. In the case at bar there is no such omission or lack of evidence.

2. The second ground for motion for new trial is nothing more than a repetition of the original motion in regard to admission of certain testimony concerning commission of offenses other than those for which the defendant is on trial.

Transcript, p. 372.

It applies to the testimony of Knutson, Alexander, Borland, Hanson, Ferguson, Lee, Witts, Abrahamson, Johnson, Likeness.

Now, at the time of the introduction of the testimony of the witnesses Knutson, Borland and Hanson, defendant did object on the ground stated, *i. e.*, that other offenses could not be proven, but for the reason set out in other portions of this brief, their testimony was admitted. But as to the testimony of Alexander, Ferguson, Lee, Witts, Abrahamson, Johnson and Likeness, no objection was made at the time to the competency of their evidence. This fully appears from an inspection of the record. On the other hand, defendant not only did not object to the introduction of said evidence, but proceeded in each case to cross-examine the witness

upon the very facts complained of, and thus himself established in the record the facts now complained of and the admission of which is assigned as error.

We contend that not having objected at the time said evidence was offered and having cross-examined upon the same, defendant is now estopped to object to the admission of said testimony.

Besides this, the motion is too broad and general.

3. We insist that the third ground for a new trial as set out in motion for new trial, as to the testimony of Hanson, Lee, Ferguson and Borland, and that part of Captain Knutson's testimony in regard to July 10th, is not well taken, for reasons already given in this brief and hereafter to be given.

X.

The tenth assignment of error is not well taken. No reason is shown why the Court should not pronounce sentence and judgment in this case, nor is there any.

The motion is too broad and general. It is not specific.

WHY OTHER ACTS ARE COMPETENT.

In this case it is insisted on behalf of the Government that other similar criminal acts of the defendant are competent in this case, for the following reasons, to wit:

1. To prove intent.
2. To prove motive.
3. To prove knowledge.
4. To prove design.

5. To prove that the crime was committed in accordance with a system, plan or scheme.

Proof of other similar acts is competent to prove intent in cases where the intent with which the act was done is equivocal and such intent becomes an issue at the trial.

Shears vs. State, 46 N. E. 331, 332.

Acts after time charged in indictment may become competent.

Moffatt vs. U. S., 232 Fed. 533.

* * * * *

OVERSTREET vs. STATE, 150 S. W. (Tex.) 899,
901.

(5) It appears that the house of F. L. Taylor was burglarized on the same day by the same parties. In cross-examining appellant the state was permitted to go to some extent into the details of that offense, which was objected to by defendant. As a general proposition of law, details of another crime are not admissible, but, in a case where the appellant contends he entered the house, as in this case, with an innocent intention to get a drink of water, and after getting in there he conceived the idea of theft and stole the property, then the details of contemporaneous offenses committed in the same manner become admissible as bearing on the intent, and in this case there was no error in admitting the testimony. The testimony on intent was sharply drawn in this case; the court, at the request of appellant, giving the following special charge: "You are instructed that, in order to constitute the offense of burglary, the intent

to commit theft must exist at the time the house was entered, and, if you believe from the evidence in this case that the defendant formed the intent to steal for the first time after entering the house of Louis Katz, then you will find the defendant not guilty.” *Penrice vs. State*, 105 S. W. 797. And in *Branch’s Crim. Law*, sec. 338, the rule is correctly stated to be that, when extraneous crimes or other transactions are *res gestae* or tend to show intent, when intent is an issue, they are admissible (citing many authorities).

STATE vs. HARRIS, 133 N. W. (Iowa) 1078. (Supreme Court of Iowa. Jan. 11, 1912.)

1. CRIMINAL LAW (§ 369*)—Evidence—Other Offenses—Identity of Accused.

The burglary of the house which accused was charged with entering in the night-time, armed with a dangerous weapon, was committed in the early part of the 22d day of May; accused being identified as the burglar by two witnesses. A watch taken from the house in question was afterwards found with property taken from the home of S., burglarized on the night of May 19th, and with other property taken from the home of D., burglarized on the night of May 23d, and the evidence tended to show that all the property had been in accused’s possession, and was under his control when arrested. Held, that the state could show by the S. family that accused was the person who entered their home armed with a dangerous weapon, and took the property, for the purpose of identifying accused as the person who committed the offense charged, though such evidence

incidentally tended to prove his guilt of an independent burglary.

HUFF et al. vs. UNITED STATES, 228 Fed. 892.
1. CRIMINAL LAW—Evidence—Other Offenses.

On a trial for conspiring to forcibly arrest W. for the purpose and with the intent to hold him in a condition of peonage, the Government offered evidence tending strongly to prove concerted action by defendants in arresting, whipping and returning W. to an employer, whose employment he had deserted. Defendants offered evidence attacking the character and reputation of the prosecuting witness, evidence tending to prove an *alibi* for some of the defendants, and evidence of the good character and standing of all of the defendants. Held that, in rebuttal, evidence that, about the time laid for the conspiracy, the defendants were acting in confederacy and concert in arresting without warrant, whipping and forcibly returning other laborers to the custody and service of employers whom they had deserted, was admissible for the purpose of showing the accord and combination of the alleged conspirators and their intent in committing the acts charged, and it was immaterial that this also tended to prove other offenses and had a bearing on the question of defendants' good character.

PEOPLE vs. JENNINGS, 43 L. R. A. (N. S.) 1210.

The plaintiff in error insists that reversible error was committed in receiving the testimony of Halsted, Mrs. McNabb, and Jessie McNabb.

The general rule is, that evidence of a distinct substantive offense cannot be admitted in support of an-

other offense. *Farris vs. People*, 129 Ill. 521, 4 L. R. A. 582, 16 Am. St. Rep. 283, 21 N. E. 821; *Addison vs. People*, 193 Ill. 405, 62 N. E. 235; *People vs. Cleminson*, 250 Ill. 135, 95 N. E. 157. But to this rule there are several well-known exceptions. If evidence is admissible on other general grounds, it is no objection to its admission that it discloses other offenses, even though they are the subject of indictment. 1 *Roscoe, Crim. Ev.*, 8th ed., 138; *People vs. Hagenow*, 236 Ill. 514, 86 N. E. 370; *People vs. Molineux*, 168 N. Y. 264, 62 L. R. A. 193, 61 N. E. 286. "Whatever testimony tends directly to show the defendant guilty of the crime charged is competent, although it also tends to show him guilty of another and distinct offense . . . A party cannot, by multiplying his crimes, diminish the volume of competent testimony against him." *State vs. Adams*, 20 Kan. 311. The test of admissibility is the connection of the facts proved with the offense charged. *Billings vs. State*, 52 Ark. 303, 12 S. W. 574; *People vs. Walters*, 98 Cal. 138, 32 Pac. 864; *State vs. Sebastian*, 81 Conn. 1, 69 Atl. 1054; 1 *Wigmore, Ev.*, sec. 216. Evidence which has "a natural tendency to establish the fact in controversy" should be admitted. *Com. vs. Merriam*, 14 Pick. 518, 25 Am. Dec. 420; *Lamphere vs. State*, 114 Wis. 193, 89 N. W. 128. One of the well-known exceptions to the settled rule as to the admission of evidence as to collateral crimes is when evidence of an extraneous crime tends to identify the accused as the perpetrator of the crime charged. 6 *Enc. Ev.* 677; *People vs. Molineux*, 168 N. Y. 268, 62 L. R. A. 193, 61 N. E. 286. When an *alibi* is disputed it is admissible to prove a collateral

offense to prove that at the time the accused was in the vicinity. Wharton, *Crim. Ev.*, 8th ed., sec. 47, note 1; 21 *Cyc.* 900, 901; *State vs. Johnson*, 111 La. 935, 36 So. 30, and cases cited; *Richardson vs. State*, 145 Ala. 46, 41 So. 82, 8 Ann. Cas. 108; *State vs. Bates*, 182 Mo. 70, 81 S. W. 408; *Johnson vs. Com.*, 115 Pa. 360, 9 Atl. 78.

In view of plaintiff in error's statements, after his arrest and before the trial, as to his whereabouts on that night, it was competent for the state to prove that shortly before the crime was committed he was near the scene of the crime, even though when seen by some of the witnesses he was engaged in the commission of other crimes. The evidence objected to tended strongly to contradict his statements as to his whereabouts at that time.

It is further insisted in this connection by plaintiff in error that the evidence of Halsted, Mrs. McNabb and Miss McNabb was inadmissible because of the uncertain character of the identification. A great deal has been written and said in the past concerning the doubtful nature of testimony identifying persons. Men's faces, like their handwriting, may be so similar that the keenest observer may be baffled in seeking to discover differences. "The witness," says Wharton, "is asked how he knows that the prisoner at the bar is the person who fired the fatal shot, and his answer is, 'I infer it from a similarity of eyes, of hair, of height, of manner, of expression, of dress.' Human identity, therefore, is an inference drawn from a series of facts, some of them veiled, it may be, by disguise and all of them more or less

varied by circumstances.” Wharton, *Crim. Ev.*, 8th ed., sec. 13. In his charge to the jury in the Tichborne Case, Lord Cockburn said: “Frequently a man is sworn to who has been seen only for a moment. A man stops you on the road, puts a pistol to your head, and robs you of your watch or purse; a man seizes you by the throat, and while you are half strangled his confederate rifles your pockets; a burglar invades your house by night, and you have only a rapid glance to enable you to know his features. In all these cases the opportunity of observing is so brief that mistake is possible, and yet the lives and safety of people would not be secure unless we acted on the recollection of features so acquired and so retained, and it is done every day.” (See citations.) In *Ogfen vs. People*, 134 Ill. 599, 25 N. E. 755, the accused was charged with robbery. On the trial one Martin and his wife and daughter, who had known the accused for ten years, testified that he came to their house at night with his face wrapped in red flannel and ordered them to deliver up their money. They testified positively to his identification, recognizing his voice. The Court held the testimony competent, and affirmed the judgment. It has been frequently held that a witness may testify to a person’s identity from his voice or from observing his stature, complexion, or other marks. (See citations.) This testimony was competent. The weight to be given it was a question for the jury, in view of all the other circumstances and evidence in the case.

KINSER vs. UNITED STATES, 231 Fed. Rep.
856, 860.

The admissibility of evidence of other transactions showing intent has been fully considered by this Court. (See citations.) In view of these authorities it seems entirely a work of supererogation to cite those from elsewhere. Nor do we find anything in *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 61 L. R. A. 193, in conflict with our previous rulings. In that case it was said:

“Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish; * * * (2) intent; * * * (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others.”

COLT vs. UNITED STATES, 190 Fed. Rep. 307.

In *Thomas vs. United States* (156 Fed. 897, 911), above, this Court, speaking by Judge Adams, said upon this question:

“Nothing is better settled in the law of evidence in any case involving fraudulent intent than that other acts and dealings of the accused of a kindred character to those charged in the case in hand and performed at or about the same time are admissible to illustrate and establish the intent or motive in the particular act directly in judgment.”

MOFFATT vs. U. S., 232 Fed. Rep. 533.

(4) A witness was allowed to testify over objections as to what was done in regard to oil wells on the property after the last date at which the mails were

charged to have been fraudulently used, and whether the wells produced oil, and how long they continued productive. The objection of counsel for the accused was as follows:

“I object. The history of what was done there must end on the 10th of October (1911). That is the last day that Moffatt is charged with having knowledge of the conditions, and we cannot impute any fraudulent intent to Moffatt for something that occurred afterward.”

After the testimony was received counsel said;

“To make my record perfectly clear, I move at this point to strike out all that this witness has said in reference to conditions or operations after the 10th of October, 1911.”

The Court held as follows: “It is quite true that an act which is not an offense when committed cannot be made one by the subsequent independent act of the person with whom it has no connection (U. S. vs. Fox, 95 U. S. 670, 24 L. Ed. 538); also that the criminal character of a transaction is to be determined by the conditions existing at the time (Norton vs. U. S., 205 Fed. 593, 123 C. C. A. 609); also that the intent with which an accused does a subsequent act cannot be imputed to him as of the prior date of the crime charged (U. S. vs. Wootten (D. C.) 29 Fed. 702.) These rules, however, do not conflict with or impair the long-established doctrine that in cases involving fraud, or the intent with which an accused does an act, collateral facts and circumstances, and his other acts of a kindred character, both prior and subsequent, not too remote in time, are admissible in evidence. (See citations.) There-

fore, so far as the effort of counsel was to exclude the subsequent acts of the accused of the character mentioned, it was properly denied.”

WOOD vs. U. S., 41 U. S. 358.

Passing from this, the next point presented for consideration is, whether there was an error in the admission of the evidence of *fraud, deducible from the other invoices offered in the case. (*360) We are of opinion, that there was none. The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty. The treatises on evidence by Mr. Phillips and Mr. Starkie contain many illustrations to this effect. (See citations.)

They constitute exceptions to the general rule, excluding evidence not directly comprehended within the issue; or rather, perhaps, it may with more certainty be said, the exception is necessarily embodied in the very points in issue, is necessarily embraced in it, and therefore a proper subject of proof, whether it be direct or only presumptive. This doctrine was

held in a most solemn manner in the case of the King vs. Wylie, 4 Bos. & P. 92, where upon an indictment for disposing and putting away a forged bank note, knowing it to be forged, evidence was admitted of other forged notes having been uttered by the prisoner, in order to prove his knowledge of the forgery. The same doctrine has been held in cases of the uttering of bad money and spurious notes; and also in cases of conspiracy. The same doctrine was affirmed and acted upon by this Court, in the case of the U. S. vs. Wood, 14 Pet. 430, in the case of a prosecution for perjury.

Where intent, motive, knowledge or design is one of the elements of the crime charged, or if it is claimed that the crime was committed in accordance with a system, plan or scheme, evidence of other like conduct at or near the time charged is admissible; the question as to whether the other occurrence sought to be proved is at or near the time of the transaction charged being a matter almost wholly within the discretion of the Court.

STATE vs. CORCORAN, 143 Pac. 454.

(1) It is argued by the appellant that it was error for the Court to permit evidence relating to the padding of the invoice, or to the taking of the chamois skins on May 9, 1913, or of finding the secreted articles in and about the work-bench of the appellant. It is contended that this was error because it permitted the state to prove an independent crime, and thereby prejudice the jury against

the appellant. There can be no doubt that, as a general rule, evidence of other distinct criminal acts cannot be introduced to prove a defendant guilty of an independent crime charged against him. This court has frequently so held. But there are exceptions to this rule. The exceptions are well stated in the case of *Collier vs. State* (Miss.), 64 South. 373, where it was said:

“Upon the trial of an indictment, a previous crime committed by the defendant can be proved only: (a) Where it is connected with the one charged in the indictment, and sheds light upon the motive of the defendant; or (b) where it forms part of a chain of facts so intimately connected that the whole must be heard in order to interpret its several parts; or (c) in cases of conspiracy, uttering forged instruments of counterfeit coin, and receiving stolen goods, for the sole purpose of showing a criminal intention.”

This Court has held to the same effect. In *State vs. Pittam*, 32 Wash. 137, 72 Pac. 1042, it was said:

“It is a well-established rule that it is not competent to show the commission by the defendant of other distinct crimes for the purpose of proving that he is guilty of the criminal charge; but, for the purpose of construing the actions or of ascertaining the intent of the defendant in the commission of the acts proven, other independent culpable acts are sometimes admissible in evidence. * * *

We think it was competent to show that in the general scheme he adopted in keeping his accounts with his employer, the result was the appropriation

by him of the funds of the employer, not for the purpose of prejudicing a jury against him by proving the commission of independent crimes, but to throw light on his intentions in the perpetration of the particular transaction constituting the crime charged.”

And in *State vs. Dana*, 59 Wash. 30, 109 Pac. 191, we said:

“Of course, if the offered testimony was relevant to the issues in this case, the fact that it tended to show the commission of another and different crime would not exclude it.”

And in *State vs. Leroy*, 61 Wash. 405, 112 Pac. 635, we said:

“Testimony otherwise relevant does not become incompetent because it may tend incidentally to show that the accused has committed another crime.”

It is true the statute provides at section 2580, Rem. & Bal. Code, that every person who shall unlawfully break and enter any building where property is kept for use, sale or deposit shall be deemed to have broken and entered with intent to commit a crime therein, but this does not prevent the state from showing the intent of the person breaking and entering. The effect of the evidence which was introduced was to show a course of conduct on the part of the appellant. The padding of the inventory, the concealment of goods which were afterwards taken away, the fact that the appellant entered the store when no one else was present, and out of hours, and took articles from the store, tended to

show the intent of the appellant upon entering the store at unusual hours, and upon the occasion charged. We are clearly of the opinion that for the purpose of showing intent, the course of conduct of the appellant was properly in evidence in this case; and falls within the exception to the rule rather than within the rule.

DEFENDANT'S NEW ASSIGNMENT OF ERROR.

Counsel for defendant now comes into this court and in his brief, pages 21 and 22, for the first time attempts to make a new and additional assignment of error, charging the failure on the part of the Government to prove venue and further to prove that the Hoonah Packing Company is a corporation.

This point was not made in either the assignment of errors or in the motion for a new trial, or otherwise. It is therefore too late to make it here.

Points of error must be particularly pointed out in assignments of error.

Walton vs. Wild Goose, 123 Fed. 209, 60
C. C. A. 155, 2 Alaska Rep. 644.

Objections not raised in the trial court cannot be raised for the first time on appeal.

Ames vs. Farrelly, 121 Fed. 820;
Ins. Co. vs. Conoley, 63 Fed. 180, 58 C. C. A.
258;
Third Nat. Bank Phil. vs. Nat. Bk. of Ches-
ter, 86 Fed 852, 2 Alaska, 645.

Technical objections must be specified in assignment of error.

State vs. Lea, 122 Fed. 614; South. Rept. 51, 52.

The practice and procedure in Alaska cases is the same as in the United States courts.

Compiled Law Alaska, § 1340.

But the point attempted to be made is not well taken. The record shows by many witnesses that the crime was committed at Admiralty Cove, on Admiralty Island. This locates the place definitely upon the chart of Alaska. Besides this, the court would take judicial knowledge of the location of the island, and Admiralty Cove. Admiralty Island is a very large island in Southeastern Alaska. Courts take judicial notice of the established boundaries of the state or territory where they are sitting and will know that a certain tract or region is or is not included therein.

16 Cyc., p. 859, § 13b, and authorities there cited.

We insist that there is no error in the record affecting the substantial rights of the defendant, and that therefore the judgment of the trial court should be affirmed.

Respectfully submitted,
JAMES A. SMISER,
U. S. Dist. Atty.,
For Defendant in Error.

No. 3544

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

AL. WEATHERS,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF
PLAINTIFF IN ERROR.

JOHN I. O'PHELAN,

Raymond, Washington,

CHARLES J. HEGGERTY,

San Francisco, California,

*Of Counsel for Plaintiff in Error
and Petitioner.*

FILED

JAN 3 - 1931

F. B. MONTGOMERY

No. 3544

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AL. WEATHERS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

We respectfully ask the Court to grant a rehearing of this cause; and we earnestly beg the learned judge who wrote the opinion herein to re-examine the record in connection with the reasons which we present herein and the facts upon which we rely to support our appeal that this cause be reheard before your Honors.

The *corpus delicti* in this case, was the presence of the defendant Al. Weathers, on the "Diana" in

Admiralty Cove on July 8th, shooting or participating in shooting at the "Forrester" with intent to rob and steal fish; and this was not proved by the evidence; there was no evidence in the case that Al. Weathers was *on* the "Diana", *in* Admiralty Cove, *on* July 8th, shooting *or* participating in shooting at the "Forrester".

We assert with absolute confidence that a review of the record on defendant's writ of error will disclose beyond possibility of dispute, that there is not even a scintilla of evidence or proof that on July 8, 1920, when the indictment alleges that the crime of assault with intent to commit robbery of fish from a trap, charged in the second count, and the crime of assault with intent to commit robbery of fish from a scow, charged in the third count, that the defendant Al. Weathers was *in* Admiralty Cove or *on* the "Diana", from which the shots were fired on the "Forrester", *or* participated in the assault from the "Diana".

The learned counsel who represented the defendant at the oral argument and who filed the brief on his behalf in this Court, omitted to bring to the attention of the Court clearly enough to have impressed the memory of the learned judge who wrote the opinion, that *one* of the grounds on which they sought a reversal was, that there was *no evidence* in the record to show or prove that defendant Al. Weathers was *on* the "Diana" *in* Admiralty Cove *on* July 8th, *when* the assault upon the "Forrester" is charged.

In the *brief* of the learned counsel for defendant in this Court, this ground *is* stated in a short paragraph (Tr. on page 25),—*hidden* in the “statement of the case”; thus:

“There is *no evidence* by any witness for the Government that defendant Al. Weathers was on the boat which the Government witnesses say they identified as the “Diana” *at the time* of the alleged shooting.” (Italics ours.)

There is not a word in the opinion of the learned judge upon this *vital* question in the case, nor anything to indicate that the learned judge believed that the attorneys for the defendant on the oral argument or in their brief, had expected that the Court would consider and decide this question or that it was involved on defendant’s writ of error to this Court.

The question, we respectively submit, is raised substantially by the tenth assignment of error, viz.:

“The Court erred in pronouncing sentence and judgment against the defendant” (Tr. 397).

And, knowing this Court as we do, we feel sure that the Court would have considered and decided this vital question, whether raised by assignment of error or not, and especially under its rule 24, subdivision 4, had the point been clearly raised in the brief or had the Court been conscious that the consideration and decision of this phase of the case was involved.

When his cause was presented to this Court in the oral argument and in the printed brief, the learned counsel confined his argument and presentation of facts to the question whether or not the trial Court had committed error in allowing the testimony of witnesses tending to show that *other offenses* of a similar nature had been committed by the "Diana" and the defendant *before* July 8th, the date of the offenses charged in the indictment, and testimony tending to identify the "Diana" on July 10th, two days *after*, at another and distant point, "Sisters Island", as the same boat from which the shots were fired at Admiralty Cove on July 8th, and tending to prove that defendant Al. Weathers was then, on July 10th, at "Sisters Island", on the "Diana".

It was not shown to this Court, either on the argument or in the brief, that there is *no* evidence that defendant Al. Weathers *was on* the "Diana", *in* Admiralty Cove, *on* July 8th, *when* the indictment charges that shots were fired from the "Diana", in Admiralty Cove, at the "Forrester".

Nor does the brief of the learned United States Attorney exhibit, nor did he in his oral argument present to this Court, any evidence in the record, showing that the defendant Al. Weathers was on board the "Diana" on July 8th in Admiralty Cove, when shots were fired from the "Diana" at the "Forrester".

The rulings of the trial Court, allowing evidence of similar offenses *before* July 8th, and of the presence at "Sisters Island" of the "Diana", two days *after* July 8th, with defendant on board, were the only matters presented to your Honors by both counsel for the defendant and counsel for the Government.

Whether or not the defendant Al. Weathers *was on* the "Diana on July 8th at "Admiralty Cove", *when* shots were fired from the "Diana" at the "Forrester", was neither specially presented to this Court in argument of this cause nor in the briefs, nor was *that* question considered or ruled by this Court in deciding this case.

The *opinion* of the learned judge of this Court follows the case as presented at the argument and in the briefs and decides only the *two* phases of the rulings, allowing evidence of *prior* similar offenses, and identifying the "Diana" with defendant on board at "Sisters Island" two days *after* the shooting from the "Diana" at the "Forrester" in "Admiralty Cove", on July 8th, as charged in the indictment.

Therefore, we most earnestly appeal to this Court, as a matter impelling justice, and especially to the learned judge who wrote the opinion in this case, to *again* examine this record in connection with this petition, and if the Court find that we are fairly sustained in our contention that there is *no* evidence or proof in this record that defendant Al. Weathers

was *on board* the “Diana” in “Admiralty Cove”, on July 8th, *when* the indictment charges that shots were fired from the “Diana” at the “Forrester”, then, that we be granted a rehearing of this cause.

Of course, it will be conceded that the *legal presumption of innocence* overcomes all possible inferences of guilt, so that no conviction could possibly be had or be sustained that would have its foundation solely upon inferences or presumptions.

The indictment charges that the assault was made *on July 8th* by shots fired from the “Diana” at the “Forrester” in Admiralty Cove, Alaska.

There were *thirteen* men on the “Forrester” at the time of this assault on July 8th (Tr. 8); and *two* only, of these thirteen men, testified on the trial— Capt. Knutson, the master (Tr. 7), and Sofus Ellison, foreman (Tr. 54). *Neither* of these two witnesses testified to a single fact identifying defendant as being on the “Diana” *at the time* of this assault, either by appearance, size, voice or otherwise. But the witness Ellison, did testify:

“Q. Now, at the time you saw this boat doing any shooting, I will ask you whether you saw *any men on board*?

A. No, sir, I didn’t” (Tr. 67).

There were *six* other witnesses, Ivor Stenso (Tr. 94), Swan Swanson (Tr. 115), Henry Alexander (Tr. 139), Andrew Abrahamson (Tr. 159), Herman Mitts (Tr. 175), and Carl Peterson (Tr. 191), who testified that they were on Admiralty Island,

saw the "Diana" in Admiralty Cove on July 8th and heard shots fired from the "Diana" at the "Forrester", but *not one* of these six witnesses testified to a single fact identifying defendant as being on the "Diana" *at the time* of the assault, either by appearance, size, voice or otherwise.

There were *no other* witnesses in the case who were in Admiralty Cove on July 8th when this assault was made, *nor* was there *any other* evidence in the case as to or concerning the "Diana" in Admiralty Cove or the shooting from her at the "Forrester" on July 8th.

The *only other* evidence in the case was as to the "Diana" at other *distant* points at times many days *before* and one occasion two and other occasions many days *after* July 8th; some of this evidence tended to prove *similar* offenses by the "Diana" at *distant* points from Admiralty Cove and a man on board resembling defendant, and the rest of the evidence tended to identify the "Diana" and defendant on board the "Diana".

But there was absolutely *no evidence* in the case identifying defendant in any manner as being on board the "Diana" on July 8th when this assault was made on the "Forrester".

There is no evidence in this record that the defendant Al. Weathers *was on board the "Diana"* in Admiralty Cove *on July 8th* when the indictment charges and the evidence shows that shots were fired from the "Diana" at the "Forrester".

The *only* evidence in the case tending to identify the "Diana" and that a man whose height and voice resembled the height and voice of the defendant was on the "Diana" at other places and on the "Diana" at Sisters Island, is evidence relating to occasions at other places *before* and at Sisters Island *after* July 8th; and this evidence was admitted by the Court *solely* for the purpose and the Court expressly charged the jury that it could be considered by the jury *solely* for the purpose of proving similar offenses to those charged in the indictment, in order to ascertain *the intent* with which the assault was made and the shots were fired from the "Diana" in Admiralty Cove on July 8th; but could *not* be used to prove that because he was on the "Diana" *before* at other distant places and *after* at Sisters Island, they could find that defendant was on board the "Diana" *on* July 8th when the assault was made from the "Diana" on the "Forrester".

The Court charged the jury:

"There has been evidence introduced of similar offenses alleged to have been committed by the defendants *at other times and places*. The evidence of these other transactions was admitted before you *for the sole purpose* of the bearing which it might have on the question *as to intent*. * * * In other words, the evidence of other offenses *can only* be taken into consideration by you *if you find* that the particular transactions charged to have occurred at Admiralty Cove *did occur* and you have *passed on to* the question of ascertaining the *intent* with which *those acts* were done." (Tr. 363-364.)

The evidence in this case does not connect defendant Al. Weathers with the assault and shooting from the "Diana", on July 8th, at the "Forrester", in Admiralty Cove, or prove the presence of the defendant on board the "Diana" on July 8th when the assault and shooting is charged in the indictment.

No witness upon the trial testified that defendant was on board the "Diana" on that occasion at that place; and *no witness* upon the trial testified either that he saw or believed he saw defendant or any person like unto him in appearance or height, or heard his voice or a voice resembling his from the "Diana" on that occasion.

Nowhere in the opinion of the learned judge of this Court is there a syllable of evidence or the testimony of a witness referred to connecting defendant Al. Weathers with this assault or showing him present on board the "Diana" when this assault and shooting took place in Admiralty Cove on July 8th.

We cannot believe that this ground for reversal was before the mind of the learned judge who wrote the opinion, because if it had been, the learned judge would have considered and noticed by decision thereon in his opinion this substantial and vital, and as it would appear, the *only real point* in the case under the assignment of errors.

The learned judge who wrote this opinion would not have failed to consider, to notice and to decide *this ground* of defendant's appeal for reversal, had

the point been pressed in the “*Argument*” portion of the defendant’s brief, or attracted his attention.

In this condition of the case, the opinion *alone* considers and decides the *two* phases of the only errors of law urged in the “*Argument*” portion of defendant’s brief, thus:

“By several of the errors assigned the plaintiff in error questions rulings *admitting* certain evidence tending to show that *on* July 10th, which was *two days after* the shooting, witnesses recognized *the boat* ‘Diana’ as the same boat from which the firing had come on July 8th. It is also said that it was error on the part of the Court *to admit* testimony of a witness who said that he had seen the *defendant upon* the ‘Diana’ *several days after* the occurrence. But, as the important point was identification of the defendant, it is clear to us that the Court was correct in admitting the testimony for the purpose of establishing his identity and also that of the boat.

“Plaintiff in error excepted to a ruling of the Court *admitting* testimony to the effect that on June 30th *before* the occurrence charged in the indictment, certain fish traps in Admiralty Cove had been opened and fish had been stolen therefrom. The Court admitted such testimony *after assurances* had been given by the District Attorney *that it would be connected with the offense charged* in the indictment. Afterwards one of the witnesses stated that in his best judgment *the boat* which he had seen about the traps *on June 30th* was the Diana, and *other witnesses said that they recognized defendant as very like one of the men they had seen on the Diana on June 30th* and that *they believed* defendant was the man they had seen *at that time*. For instance, the witness Ferguson was asked whether *he* had known the defendant

Weathers by sight *on June 30th*. His answer was that he did *not* know him *at that time*. We quote what follows: 'Q. When did you see him next? A. I seen him here in the court room. Q. You recognized him as the man? A. Yes. He looked very much like the man. Q. To the best of your belief, state whether or not he was the man. A. There is no doubt in my mind but what he is the man.' It was not error to admit evidence which tended to show that defendant was guilty of other *similar offenses* committed shortly *before* the time of the offense charged in the indictment. The Court expressly charged the jury that *the evidence of such other* transactions was *admitted solely* as bearing upon the question of *intent*; that if defendant did *not* do the shooting or make the assault charged, then it would not make any difference what other offenses he might have been guilty of, or with what intent any other things were done; but, if it was found that the defendant did make the assault as charged, then evidence bearing upon other assaults with intent to kill or to rob or steal from fish traps could be taken into consideration *only as bearing upon* the question of *intent* with which the acts charged in the indictment were done. This statement of the law conforms with well established rules. *Moffatt v. United States*, 232 Fed. 522; *Deason v. United States*, 254 Fed. 259, *Certiorari denied*, 249 U. S. 607; *Byron v. United States*, 259 Fed. 371; *Riddell v. United States*, 244 Fed. 695." (Italics ours.)

It is respectfully submitted a rehearing of this cause should be granted.

Dated, San Francisco,
January 3, 1921.

JOHN I. O'PHELAN,
CHARLES J. HEGGERTY,
Of Counsel for Plaintiff in Error

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
January 3, 1921.

CHARLES J. HEGGERTY,
*Of Counsel for Plaintiff in Error
and Petitioner.*

NO. 3544

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AL WEATHERS,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error

ANSWER BY DEFENDANT IN ERROR TO
PETITION FOR A REHEARING.

JAMES A. SMISER,

United States Attorney,

Juneau, Alaska,

Attorney for Defendant in Error

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F. D. MONGKTON,
CLERK

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AL WEATHERS,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error

ANSWER BY DEFENDANT IN ERROR TO
PETITION FOR A REHEARING.

To the Honorable Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Plaintiff in error comes now in his petition for
a rehearing in this court and for the first time in
this record raises the point that the *corpus delicti*

and the connection of the defendant therewith has not been proven.

This of course is purely a question of fact depending alone upon the evidence in the record. Had plaintiff in error relied upon this defense it was incumbent upon him to have made a motion for a directed verdict in the court below, upon the conclusion of the introduction of evidence. But he totally failed to make any such defense by motion for a directed verdict, either at the conclusion of the States evidence,

See Transcript p. 287,

or upon the conclusion of the entire evidence for both sides.

See transcript p. 358.

At the conclusion of the evidence in chief for the Government he made a motion to strike out certain evidence which had been presented by the Government.

See Transcript pp. 287-288.

But he made no such claim as he now presents to the Court. He did, of course, contend on the trial below that he was not guilty and as a defense introduced certain witnesses to prove an alibi, but the jury evidently did not believe these witnesses. It may be that counsel in his oral argu-

ment contended that the case had not been proved, but as the record is silent as to this we cannot speculate. But however this may be, the facts are that the entire question involving *corpus delicti* and the defendant's connection therewith were submitted to the jury and decided adversely to defendant—plaintiff in error. Had he, at the time of the trial below, believed that the *corpus delicti* and defendant's connection therewith had not been shown by the evidence, he should have made a motion for a directed verdict. Having failed to do this and having submitted these questions to the jury, he cannot now complain. Furthermore, there is no assignment of error raising this point. It is therefore not now before the Court.

See Holsman vs. U. S. 248 Fed. 193-198.

It has been universally held by this court that a failure to make and rely upon a motion for a directed verdict at the end of the evidence constitutes a waiver of such defense. Among other recent decisions of this Court, His Honor Judge Gilbert rendering the opinion in the case of *Clark vs. U. S.* held as follows:

"Defendant's motion, at the conclusion of the prosecution's evidence, to dismiss, was waived by introduction of evidence on his behalf, and by his failure to move for an instructed verdict at the close of the evidence."

Clark vs. United States, 245 Fed. 112-114.

Assignments of error, not set out in plaintiff in error's brief as required by Rule 24 (150 Fed. XXXIII, 79 C. C. A. XXXIII), cannot be considered.

Harris vs. United States, 249 Fed. 41-42,

Dextrell vs. True, 74 Fed. 12-14.

Failure to renew motion for directed verdict at close of evidence waives objection.

Prosser vs. United States, 265 Fed. 252-253.

Alleged errors disclosed in defendant's briefs, but not included in assignment of errors, need not be considered.

Holsman vs. United States, 248 Fed. 193-198.

Insufficiency of evidence cannot be considered by the Court:

First, because not properly raised by motion for directed verdict after all the evidence.

Second, it is not the province of the Court to pass upon the weight or sufficiency of the evidence.

Hale vs. United States, 242 Fed. 891-893,
Village of Alexandria vs. Stabler, 50 Fed. 689,

Pac. Mut. Life Insc Co. vs. Snowden, 58 Fed. 642-7,

Simpson vs. United States, 184 Fed. 817-820,

Burton vs. United States, 142 Fed. 57-59,
Hansen vs. Boyd, 161 U. S. 397-402.

The jury's findings of fact are binding upon the Circuit Court of Appeals when there is any evidence to support them.

Oppenheim vs. United States, 241 Fed. 625-627 Sec. 2,

Dean vs. United States, 246 Fed. 568-572.

In his petition for a rehearing on page three, ccounsel for plaintiff in error contends that the question was raised in the tenth assignment of error, which is as follows: "The Court erred in pronouncing sentence and judgment against the defendant."

See Transcript p. 397.

This proposition we deny. When we look to the assignments of error we find that this, the tenth assignment, is the last assignment made. It is general in its terms and means nothing except as construed with the other assignments which had preceded it. It says the Court erred "in pronouncing judgment." But why? The only logical conclusion is that it erred because of the admission of the testimony complained of in the first nine assignments of error, or some of them. It

certainly could not refer to any new and unthought-of matter which might thereafter arise in the mind of counsel, but which was never presented to the trial Court.

An assignment of error must be based upon the record and the conclusions which are drawn from the record. But even were we to concede that the tenth assignment did fairly raise the point as now contended, still that would not avail anything. It is too late when we come to assignment of errors to, for the first time, raise a question as to the sufficiency of evidence. This must be done at the proper time and place, viz. in the trial court at the conclusion of the evidence. Unless made then and there, it is waived, as shown by all the authorities above cited.

It is the province of the Appellate Court to review the rulings of the *trial* Court on questions actually brought to the attention of *that court* and decided by it. An assignment of error that the verdict of a jury is contrary to the evidence goes for nothing, unless the beaten party asked for a peremptory instruction for a verdict in his favor at the close of all the evidence and duly excepted to a refusal to give such instruction.

Dextrell vs. True, 74 Fed. 13-14.

Again, this Court has held as follows:

"The principal error relied upon and chiefly discussed is the insufficiency of the evidence to support the verdict of the jury. We cannot review the sufficiency of the evidence, for the reason that this court can only review errors of law committed by the trial court, and no request for an instructed verdict was made after all of the evidence had been introduced. To enable this court to review the sufficiency of the evidence in an action at law, the complaining party must, after all the evidence has been introduced request the trial court to direct a verdict. The refusal of the trial court to grant such request presents a ruling the correctness of which may be reviewed in the appellate court. In the absence of such request, no action of the trial court in that respect is presented."

Simpson vs. United States, 184 Fed. 817, 820.

This same doctrine is announced in

Bernal vs. United States, 241 Fed. 339, 341,

Cooper vs. United States, 247 Fed. 45-47 (3-5).

But notwithstanding all that has above been said, had plaintiff in error done what he failed to do and have made such a motion at the conclusion of the evidence, it could have availed him nothing.

The proof in the record was abundant to warrant the jury in its findings and no court with due regard to the law could have ordered a directed

verdict. It is undisputed in the testimony that defendant was the owner and master of the boat The Diana. That he plied the same for several months in the waters of southeastern Alaska and especially in the vicinity of Admiralty Cove where the assault was committed. That this same boat had visited and robbed the fish traps situated at Admiralty Cove on a number of occasions during the summer of 1919 and immediately prior to July 8, 1919, to-wit, on June 5th, June 17th, June 29th, and July 5th, 1919. On July 8th, 1919, at the time of the assault, a man of the same appearance and description as defendant was on the deck of the boat Diana.

See Transcript, p. 127.

Testimony as to what occurred at Admiralty Cove on June 5th, June 17th, June 29th, and July 5th and as to what occurred at Strawberry Point on June 30th, 1919 and at Ground Hog Bay on July 7th, 1919 and in the latter part of June or first of July, 1919.

See Transcript pp. 241 and 242,
(when Al Weathers was clearly identified,)

was all competent to prove identity of defendant, to prove intent, to prove a common scheme, system, etc., as has been directly held by your Honors' opinion now on file in this case. This is an in-

variable rule sustained by innumerable decisions.
We cite the following:

Evidence of other crimes to show identity,
system, etc.—

People vs. McGilver, Cal. (20069) 7 Pac.
49,

State vs. Kepper, (Iowa) 23 N. W. 304-
307,

State vs. Harris, (Iowa) 133 N. W. 1078-
1080,

Moffatt vs. United States, 232 Fed. 522,

Deason vs. United States, 254 Fed. 259,

Byron vs. United States, 259 Fed. 371,

Riddell vs. United States, 244 Fed. 695,

People etc. vs. Louis Thau, 219 N. Y. 39,
113 N. E. 556 Reported in 3 A. L. R.
1537-1540-1545-1556,

R. C. L. Vol. 8, p. 201, sec. 196,

R. C. L. Vol. 10, p. 939, sec. 107-109.

Corpus Juris, Vol. 16, p. 588, sec. 1135, p.
856 sec. 2157.

We also cite other authorities cited in defend-
ant in error's original brief on file in this cause,
and insist that the petition for rehearing should be
denied,

Respectfully submitted,

JAMES A. SMISER,

United States Attorney,

Counsel for Defendant in Error.

No. 3545

United States
Circuit Court of Appeals
For the Ninth Circuit.

CINCINNATI DISTRIBUTING COMPANY, a
Corporation,

Plaintiff in Error,

VS.

SHERWOOD & SHERWOOD COMMERCIAL
COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

FILED
SEP 1 1920
F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals
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CINCINNATI DISTRIBUTING COMPANY, a
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court, in and for the
Northern District of California, Second Division.

No. 16,152.

THE CINCINNATI DISTRIBUTING CO., a
Corporation,

Plaintiff,

vs.

SHERWOOD & SHERWOOD COMMERCIAL
COMPANY, a Corporation,

Defendant.

Complaint for Damages.

I.

That plaintiff is now and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Ohio, and having its office and principal place of business in the city of Cincinnati, in said state, and said plaintiff is a resident of the State of Ohio.

II.

That defendant is now and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of California, and having its office and principal place of business in the city of San Francisco in said state and said defendant is a resident of the State of California.

III.

That on or about the 14th day of March, 1918. at the city of Los Angeles, State of California, plain-

tiff purchased from defendant, and defendant sold to plaintiff one hundred and ninety-eight barrels of whiskey for which plaintiff promised and agreed to pay on delivery the sum of \$13,042.25 and defendant promised and agreed to deliver said whiskey to plaintiff immediately on demand therefor.

IV.

That though demand has been made for the delivery of [1*] said merchandise, defendant has failed, refused and neglected and still fails, refuses and neglects to deliver the same or any part thereof, and said merchandise and the whole thereof is now in the possession of the above named defendant.

V.

That if the defendant had delivered the said whiskey to plaintiff at the time and in the manner agreed upon there would have been due to said defendant the sum of \$13,042.25; that said whiskey if the same had been delivered to the plaintiff at the time and in the manner agreed upon it would have had a value to plaintiff of \$18,315 which said sum was the market value of said whiskey in the city of Los Angeles, State of California, being the place at which delivery thereof was to have been made.

That by reason of the failure of the defendant to deliver said merchandise to plaintiff, plaintiff has been damaged in the sum of \$5,272.75. no part of which has been paid.

WHEREFORE, plaintiff prays judgment against said defendant in the sum of \$5,272.75 together with

*Page-number appearing at foot of page of original certified Transcript of Record.

interest and its costs of suit in this behalf incurred.

WISE & O'CONNOR,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco,—ss.

Otto Irving Wise, being first duly sworn, deposes and says:

That he is one of the attorneys for plaintiff in the above-entitled action; that he has read the above and foregoing complaint and knows the contents thereof, that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and that as to those matters he believes it to be true.

That he makes this affidavit for and on behalf of plaintiff for the reason that plaintiff is absent from the City and [2] County of San Francisco, State of California, wherein affiant has his offices.

OTTO IRVING WISE.

Subscribed and sworn to before me this 10th day of April, 1918.

[Seal] JULIUS CALMANN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Apr. 10, 1918. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [3]

(Title of Court and Cause.)

Answer.

Comes now the defendant and answering the complaint of plaintiff on file herein—

I.

Alleges that it has not sufficient knowledge or information upon which to answer the allegation of Paragraph One of said complaint to the effect that plaintiff is or ever was a corporation; and for that reason denies the same.

II.

Denies that defendant has its office and principal place of business or its office or principal place of business in the city of San Francisco in said State; but, on the contrary avers that its office and principal place of business is in the City of Los Angeles.

III.

Denies that on or about the 14th day of March, 1918, at the city of Los Angeles or at any other time or place or at all, plaintiff purchased from defendant or defendant sold to plaintiff one hundred and ninety-eight or any other number of barrels of whiskey or any whiskey; and denies that plaintiff promised and agreed or promised or agreed to pay on delivery \$13,042.25 or any other sum or at all; and denies that plaintiff promised and agreed or promised or agreed to deliver said or any whiskey to plaintiff immediately on demand thereof or at any other time or in any other manner or at all.

IV.

Denies that any demand has ever been made for delivery of said or any merchandise; and denies that defendant has failed, refused or neglected to deliver the same or any merchandise to plaintiff; but admits that defendant has not delivered the merchandise

described in said complaint or any similar [4] merchandise to plaintiff no contract or agreement having ever been made between the parties to this action in relation to the same.

V.

Denies that if defendant had delivered the said whiskey to plaintiff there would have been due to the defendant the sum of \$13,042.25; but, on the contrary, avers that if any contract had been made for the sale of said whiskey by defendant to plaintiff there would be a sum far in excess of said amount due as the purchase price thereof; but in that behalf defendant denies that there ever was any agreement for the delivery of said whiskey to plaintiff at any price whatsoever. Denies that the said whiskey would have had or did at any time have a value to plaintiff of \$18,315 or any other sum or at all.

Denies that plaintiff has been damaged in the sum of \$5,272.75 or in any sum whatsoever.

WHEREFORE, defendant prays to be hence dismissed with his costs.

LUCIUS L. SOLOMONS,
Attorney for Defendant.

State of California,
City and County of San Francisco,—ss.

Lucius L. Solomons, being first duly sworn, deposes and says:

That he is one of the attorneys for defendant in the above-entitled action; that he has read the above and foregoing complaint and knows the contents thereof, that the same is true of his own knowledge except as to the matters which are therein stated on his infor-

mation or belief, and that as to those matters he believes it to be true.

That he makes this affidavit for and on behalf of defendant for the reason that defendant is absent from the City and County of San Francisco, State of California, wherein affiant [5] has his offices.

LUCIUS L. SOLOMONS.

Subscribed and sworn to before me this 21st day of May, 1918.

[Seal]

W. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California.

Receipt of a copy of the within answer is hereby admitted this 21 day of May, 1918.

WISE & O'CONNOR,

Attorney for Plff.

[Endorsed]: Filed May 22d, 1918. Walter B. Maling, Clerk. [6]

(Title of Court and Cause.)

Judgment of Nonsuit.

This cause having come on regularly for trial on the 7th day of May, 1920, being a day in the March 1920 term of said Court, before the Court and a jury of twelve men duly impaneled and sworn to try the issue joined herein; Richard S. Goldman, Esq., appearing as attorney for plaintiff and Fred C. Peterson, Esq., appearing as attorney for defendant; and the trial having been proceeded with and evidence having been introduced on behalf of plaintiff and

closed, and the attorney for the defendant having thereupon moved the Court for a judgment of nonsuit, and the Court after hearing arguments of the respective parties upon said motion and after full consideration thereof having ordered that said motion be granted and that a judgment of nonsuit be entered herein with costs to the defendant:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action; and that judgment of nonsuit be and is hereby entered against said plaintiff herein; that the defendant go hereof without day; and that said defendant do have and recover from said plaintiff its costs herein expended, taxed at \$31.00.

Judgment entered May 7, 1920.

WALTER B. MALING,
Clerk. [7]

In the District Court of the United States, in and for
the Southern Division of the Northern District
of California, Second Division.

No. 16,152.

CINCINNATI DISTRIBUTING COMPANY, a
Corporation,
Plaintiff,

vs.

SHERWOOD & SHERWOOD COMMERCIAL
CO., a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled action came on regularly for trial before the above-entitled court, sitting with a jury, on the sixth day of May, 1920; Hon. Frank H. Rudkin, United States District Judge, presiding. Messrs. Goldman & Altman appearing as attorneys for plaintiff, and Messrs. Lucius L. Solomons and Fred C. Peterson appearing as attorneys for defendants.

The jury having been duly empaneled and sworn, the following proceedings were had, and testimony in evidence introduced, objections and rulings made, and exceptions taken and allowed:

Deposition of Samuel Davis, for Plaintiff.

Plaintiff read in evidence the deposition of SAMUEL DAVIS, who testified as follows:

Direct Examination.

I was in Los Angeles on the fourteenth of March, 1918. I was in the office of Sherwood & Sherwood Commercial Company on that [8] day. While there, I heard Mr. Harry Lieb, the managing head of that company, conduct a conversation over the telephone with Sidney L. Hellman. I heard Mr. Lieb say that he would take \$1.35 per gallon for "Old Taylor." I know he was speaking with Mr. Sidney Hellman, because he stated to me right after the conclusion of the conversation that he was talking to a friend of mine, and I asked him who, and he said, "Sid Hellman." The gentleman that I have just referred to was connected with the Cincinnati

(Deposition of Samuel Davis.)

Distributing Company, of Cincinnati. Mr. Lieb stated to me after his conversation with Mr. Hellman, that if he sold at \$1.35 he would sell at a nice profit, and make about \$6,000 on the deal.

Cross-examination.

At the time of the conversation referred to I was employed by the Clysmic Spring Company. I was soliciting the business of Sherwood & Sherwood. I had known Mr. Hellman about a year before this conversation, in a business way. I do not know what Mr. Hellman said over the telephone to Mr. Lieb. I know that Mr. Lieb, during his conversation, said he would take \$1.35 for the whiskey, and I supposed that Mr. Hellman had taken him up, as he told me later in San Francisco that he had bought that whiskey. I do not know whether Mr. Hellman and Mr. Lieb ever had a meeting after this conversation, with reference to making a contract for the whiskey. I do not know the total number of gallons which were purchased or how much was to be paid.

The whiskey was located at Sherwood & Sherwood, at San Francisco. I do not know whether it was in a Government warehouse. I do not know the year that the whiskey was made, or how delivery or payment was to be made. From Mr. Lieb's conversation, I supposed that there was some quantity, owing to the fact that he had figured the amount of profit out to me. The amount was \$6,000, I remember. Mr. Lieb said that selling the whiskey at \$1.35 a gallon, he would make a profit of about \$6,000. The [9] portion of the conversation that I heard took

(Deposition of Samuel Davis.)

about five minutes. I do not know whether Mr. Hellman was in Los Angeles or San Francisco at the time. Mr. Lieb did not tell me.

Redirect Examination.

I understand now the whiskey was bought by Sherwood & Sherwood for seventy or eighty cents, and sold for \$1.35, leaving a profit of sixty or seventy cents a gallon, I do not know which. I know this from the conversation I had with Mr. Lieb when he was figuring the profit.

Recross-examination.

Mr. Lieb was boasting of the very fine profit that he would make in selling the whiskey at that price. I was familiar with the prices at which whiskey was being sold at that time, \$1.35 was the market price. As I understood the conversation, the whiskey was at the main office in San Francisco. It might have been in the warehouse. I do not know whether Mr. Hellman asked any questions as to where the whiskey was located.

I do not know anything about the serial number of the receipts, the number of gallons, or anything of that nature; that was a matter between Hellman and Lieb. I do not recall any statement that was made that would indicate when the payment for the whiskey was to be made.

Redirect Examination.

I was engaged in the whiskey business for six years. I am familiar with the customs and usages governing transactions such as took place between

(Deposition of Samuel Davis.)

Mr. Lieb and Mr. Hellman. In such matters payment is made by the buyer at the time that the warehouse receipts are received, with a draft attached thereto. I heard Mr. Lieb say to Mr. Hellman that he could consider the deal made at \$1.35, and that he was leaving the office to go downtown. [10]

Recross-examination.

(Q.) I will ask you if it is customary and usual for men purchasing whiskey in the sum of \$13,000, when the purchaser and seller are in the same city, to transact such a thing over the telephone.

(A.) At that time, as I would take the matter under consideration, the fact that the market was changing overnight, dropping and soaring high, business was done in that manner all over California—particularly at that time in California. The custom was for a man to buy and sell on a brokerage commission. He would call up the seller, and if he had anything to sell, the sale would be completed over the telephone, or on the street, without any cash paid in advance. Owing to the advancing market, it seemed to be the custom to take each other's word. To my knowledge, it was not customary or usual for people engaging in business of that magnitude to do their business in writing in the whiskey business.

Deposition of Sidney L. Hellman, for Plaintiff.

THEREUPON plaintiff read in evidence the deposition of SIDNEY L. HELLMAN, who testified as follows:

I reside in Louisville, Kentucky. My occupation

(Deposition of Sidney L. Hellman.)

is the whiskey commission business. I have been engaged in that business since 1887. During the month of March, 1918, I was a stockholder and officer of the Cincinnati Distributing Company, an Ohio corporation, engaged in the whiskey brokerage business. The president of this corporation was Louis L. Rosensteil. I was secretary and treasurer. In addition to my duties as an officer, I bought and sold whiskey for the company.

In March, 1918, I was either in Los Angeles or San Francisco. I went to Los Angeles about the middle of March, 1918. While there, I purchased from Messrs. Sherwood & Sherwood, 200 barrels of "Old Taylor" whiskey, on advice from the Cincinnati office. I purchased 100 barrels of the "Fall of 1913" at \$1.32½, and 100 [11] barrels of the "Spring of 1914" at \$1.35, less all charges to date, and 2% commission. I was acting for the Cincinnati Distributing Company. I mean that I purchased this whiskey at \$1.32½ and \$1.35 per proof gallon, as shown by the warehouse receipt, which always have marked thereon the number of gallons of each barrel purchased.

The whiskey was stored at the distillery warehouse, close to Frankfort, Kentucky. The 200 barrels of whiskey purchased by me would contain close to 10,000 gallons. Whiskey in a bonded warehouse runs about 48 gallons to a barrel.

I purchased this whiskey in the following manner: I spoke to Mr. Lieb, who was the manager of the Sherwood business, at Los Angeles, and he men-

(Deposition of Sidney L. Hellman.)

tioned having this "Fall of 1913" and "Spring of 1914" Old Taylor Whiskey. I told him the market for these goods at that time was about \$1.30 for the 13's, and \$1.45 for the 14's. The terms "13's" and "14's" would mean to the trade that the goods had been made in the spring or fall of the year mentioned, which is the usual way of identifying the age of whiskey. Mr. Lieb told me that he would probably take \$1.35 per proof gallon for the 200 barrels, and that he would communicate with me at 4 o'clock in the afternoon. This was either March 13th or March 14th. I called Mr. Lieb up over the telephone at 4 o'clock. He told me he had concluded to let me have the goods at \$1.35 per proof gallon, less charges and commission. I then informed him that I would not purchase it at that price, because I had purchased goods of similar description, with a difference of 5¢ per gallon between the 13 and 14 ages, but that in this instance I was willing to take them at a difference of 2½¢, and offered him \$1.32½ for the "Fall of 1913," and \$1.35 for the "Spring of 1914." After a moment's hesitation, he said, "Very well, I will take it"; and I said immediately, "I wish you would wire confirmation to our Cincinnati office"; and he replied, saying, "I am ready to leave the office; there is someone [12] waiting for me, and I cannot take the time. Will you make this confirmation yourself for me?" I naturally did so. Mr. Lieb was representing the Sherwood & Sherwood Commercial Company, of Los Angeles, in this transaction. After this conversation, I immediately

(Deposition of Sidney L. Hellman.)

wired confirmation to the Cincinnati Distributing Company, of this lot of whiskey.

There was one barrel short in each of the lots, by reason of the fact that there was an excessive outage in one barrel of the 13's and one barrel of the 14's. This reduced the total amount to 198 barrels.

The following morning I had another conversation with Mr. Lieb at his office. He said that one of the young ladies in his employ was making out the invoice, and he asked me if I wanted to check them over; and I said, "No, that will be done by our office. I haven't the time, and cannot do it as well as they can." He said to me, "How do you want me to close this transaction?" I said, "This is a cash transaction. As soon as you have your invoices made out, attach the warehouse receipt and your invoice to a sight draft for the amount shown by your invoice, and put it into the bank as cash, and it will be paid on presentation at Cincinnati. If there are any errors in your figures they can be checked as they come to the Cincinnati office."

Mr. Lieb stated that this would be satisfactory. I notified the Cincinnati office of this purchase immediately after my conversation with Mr. Lieb, at 4 o'clock, on the 14th of March, 1918. The document which is now shown me is a copy of a telegram which was sent by me to the Cincinnati Distributing Company, and bears date March 13, 1918.

THEREUPON plaintiff offered in evidence, the document referred to by the witness, which said

document was admitted in evidence, and marked "Plaintiff's Exhibit 1." [13]

To the introduction of said exhibit, as well as Plaintiff's Exhibits 2, 3 and 4 hereinafter set forth, defendant objected on the ground that said exhibits, and each of them, were irrelevant, incompetent, immaterial, hearsay and insufficient to constitute a valid contract or memorandum thereof under the statute of fraud. Said exhibit 1 was in words and figures as follows: [14]

Plaintiff's Exhibit No. 1.

"The Cincinnati Distg. Co.,
Cincinnati, O.

Sherwood will sell hundred spring fourteen hundred fall fourteen Old Taylor. If you want in addition to Melezer purchase believe one thirty five for fourteen one thirty two half for thirteen less commission would buy. Wire fast message either way Offer less draft through Muellenkamp or any direct buyer.

(Signed) S. L. HELLMAN."

The next day noon I received a telegram, which I herewith produce.

(Said telegram was thereupon offered and admitted in evidence, and marked "Plaintiff's Exhibit No. 2." Said telegram is in words and figures as follows:)

Plaintiff's Exhibit No. 2.

“Cincinnati, O., Mar. 14, 1918.

Sidney L. Hellman,
Cr. Vannuys Hotel,
Los Angeles, Calif.

Buy Sherwood Taylor at prices your wire or better. Fall thirteens spring fourteen. Wire quick.

(Signed) CINCINNATI DISTRIBUTING
CO.”

On March 14, 1918, in reply to Plaintiff's Exhibit No. 2, I sent the wire, a copy of which is herewith exhibited to me.

(Thereupon, plaintiff offered said wire in evidence, and the same was admitted and marked, “Plaintiff's Exhibit No. 3.” Said wire was in words and figures as follows:)

Plaintiff's Exhibit No. 3.

“Los Angeles, Calif., Mar. 14, 1918.

The Cincinnati Distributing Co.,
607 Traction Bldg.,
Cincinnati, O.

Bought ninety nine each fall thirteen spring fourteen Taylor. One thirty two half thirty five less commission.

(Signed) S. L. HELLMAN.”

After sending the last telegram, I returned to San Francisco. [15]

On March 26, I received a telegram from the Cincinnati Distributing Company, at San Francisco, which said telegram I herewith produce.

(The telegram referred to by witness was thereupon offered in evidence, and admitted, and marked "Plaintiff's Exhibit No. 4." Said telegram was in words and figures as follows:

Plaintiff's Exhibit No. 4.

"Cincinnati, O., Mar. 26, 1918.

S. L. Hellman,

Care Palace Hotel,

San Francisco, Calif.

Have not received the two hundred barrels Taylor we bought from Sherwood and Sherwood. We sold these goods some time back to the Loma Grand Company Chicago. We must have delivery.

(Signed) THE CINCINNATI DISTRIBUTING
CO."

Upon receipt of this telegram, I write Mr. Lieb immediately, and got him on the long-distance telephone. I told him that the office was anxiously awaiting delivery of the goods. The connection was very poor, but I understood him to say that we could not get delivery, and that I should write him. I thereupon sent him a wire to the effect that he would have to make delivery of these goods, or give me assurances in writing that they would deliver these goods. This telegram was eventually returned to me by mail, with a notation on it that is in his own handwriting and his signature.

(The witness thereupon produced said telegram, which was thereupon offered in evidence by plaintiff, and marked "Plaintiff's Exhibit No. 5." Said telegram and the written notation thereon is in words and figures as follows:)

Plaintiff's Exhibit No. 5.

“San Francisco, Cal., Mar. 30, '18.

Sherwood & Sherwood Mer. Co.

Los Angeles, Cal.

Unless you notify me or my company in writing immediately that you will deliver the one hundred ninety eight barrels of Taylor I bought from you we will buy same on the market deliver to our purchaser and bring suit against your company for any loss to us.

CINCINNATI DISTRIBUTING CO.,

S. L. HELLMAN.

(NOTATION.)

Sid: Have your head examined and go as far as you like.

(Signed) HARRY LIEB.” [16]

This pencil notation was the first positive intimation I had that Sherwood & Sherwood would not deliver the 198 barrels of Old Taylor Whiskey. Previous to sending this telegram, I had the long distance with Mr. Lieb, which I have just referred to, and I understood him to say at that time that he would not make delivery. Upon receipt of this information, I wired the office of the Cincinnati Distributing Company, in Cincinnati, advising them that Lieb refused to make delivery.

Subsequent to writing Mr. Lieb with reference to this transaction on March 28th, I received a letter from Mr. Lieb, which I herewith produce.

(Said letter was thereupon offered in evidence by plaintiff and admitted, and marked “Plaintiff's Ex-

(Deposition of Sidney L. Hellman.)

hibit No. 6.” Said letter was in words and figures as follows:)

Plaintiff's Exhibit No. 6.

“Los Angeles, Calif., Mch. 29, 1918.

Mr. S. L. Hellman,

c/o Palace Hotel,

San Francisco, Calif.

Dear Sid:

I have for acknowledgment your favor of March 27, which has been carefully noted. There is no question that you were willing to buy some 200 barrels of Old Taylor that we spoke of when you were here; but at the same time you must remember there was no positive decision as to our selling. And another thing, due to our long, pleasant acquaintanceship, when you advised the writer that at the price quoted you were compelled to sell at lower figures, treating you as a friend, nothing in the world would tempt me to force a loss on you. To be candid and truthful, we have sold the whiskey at a much higher price at which you offered.

The motto of this communication is: ‘Do not sell what you have not purchased, or what has not been sold to you.’

Sid, dear fellow, you were a little bit too anxious. At no time during our conversation did I positively advise that we would sell at the price you mentioned. If you will recall, the writer said he would like to get a certain figure for the whiskey, and advised that we

(Deposition of Sidney L. Hellman.)

were checking up to see if we could sell at the price quoted.

Very truly yours,

(Signed) H. M. LIEB."

This letter is in the handwriting of Mr. Lieb, manager of the Sherwood & Sherwood Commercial Company, at Los Angeles. [17]

The "Old Taylor" whiskey referred to in this transaction, is one of the best known brands of whiskey in America. The market price of this whiskey of the kind purchased by me from Sherwood & Sherwood, on the 30th day of March, 1918, or the 1st day of April, 1918, ranged from \$1.75 to over \$1.85 a gallon. The market rose steadily from September, 1917, from sixty or seventy cents per gallon, up to \$1.85 and \$2.00 by the following April.

Cross-examination.

I had never previously purchased whiskey from Sherwood & Sherwood. I was not familiar with their business methods. They were familiar with mine, because of purchases of this sort where they have sold other whiskies was made exactly in this way. The year preceding this transaction I had bought for the Cincinnati Distributing Company, about 7,000 barrels of whiskey. Of this, probably 2,000 barrels was purchased by telephone. Our method, and the method of all houses in the business, was to transact these matters by telephone when on the ground. I received confirmation of the purchase in this case by Mr. Lieb telling me to wire for him to confirm it. This is the only instance that I re-

(Deposition of Sidney L. Hellman.)

call, where confirmation was given in the manner that I have just described. I had previously purchased whiskey without obtaining confirmation, or without any writing. I believe that I had made such purchases during the fall of 1917. I thought I had the usual and customary confirmation in this case, when Mr. Lieb gave me permission to wire for him that he confirmed the sale. I signed my name to the wire. I did what he told me to do.

I have been acquainted with Mr. Lieb for twelve years, and I believe that he would do just what he said he would do. I did not become suspicious by reason of the failure to receive any wire or confirmation from Sherwood & Sherwood. I had taken it for granted that Mr. Lieb had fulfilled his agreement, until the [18] Cincinnati office wired me that the papers had not arrived. The first written information that I received from Sherwood & Sherwood that the goods were not being delivered, was the letter which has been introduced in evidence, and marked "Plaintiff's Exhibit No. 6." I received this before I received my telegram returned with the pencil notation. Mr. Lieb told me to confirm the sale at the time of our telephone conversation when the deal was closed, to which I have previously referred. On the following day when I called at Mr. Lieb's office, I asked him for a further confirmation in writing; I thought he was giving it to me with the draft attached to the papers. He did not give me the papers; they were to be put in the bank as cash—he was to put the draft in as cash. I did not get the

(Deposition of Sidney L. Hellman.)

draft then. He did not give me anything. I did not know that the confirmation he had given me the day before was an irregular confirmation. I did not ask him for a separate confirmation the following day.

I received a wire from the Cincinnati Distributing Company that the goods had been sold to the Loma Grand Company, of Chicago. I believe that was the day following the date that the purchase was made. I have a copy of the invoice to the Loma Grand Company. It appears from the invoice, that it was sold at \$1.40 per gallon. At this rate, the profit on the sale would have been between \$700 and \$800. On the date that the purchase was made, whiskey of that description might have been purchased in the open market in the east at the same price that I purchased it from Sherwood & Sherwood. It could not have been bought on the coast, because I had bought all that was out there that I knew of.

The day after the purchase was made, Mr. Lieb further confirmed the sale to me by telling me that he was figuring the papers; and asked what method should be taken to get his money, and I told him to put the invoice in with a draft attached as cash; and his answer was, that that was perfectly satisfactory.

[19]

The Cincinnati Distributing Company delivered the 198 barrels of whiskey to the Loma Grand Company of Chicago, at \$1.40 per proof gallon, in accordance with its contract. The whiskey to fill that order

(Deposition of Sidney L. Hellman.)

was purchased in the open market at \$1.85 per proof gallon.

Redirect Examination.

(Q.) I will ask you to state whether or not the confirmation as made by Mr. Lieb in this transaction, was or not irregular.

(A.) It was regular. Had I not *through* that it was regular, I would have insisted on getting what I considered was a regular confirmation. I had known of a few thousand such confirmations as was obtained in this case, in the whiskey trade.

Where the transaction was a matter of correspondence between the parties, it would naturally be confirmed by telegram. In all of transactions where both of the contracting parties is on the ground, most of them are done over the telephone. I did not purchase the whiskey from Sherwood & Sherwood until the Cincinnati Distributing Company had authorized me to buy the same.

Deposition of Lewis S. Rosenstein, for Plaintiff.

THEREUPON plaintiff read in evidence, the deposition of LEWIS S. ROSENSTEIL, who testified as follows:

In March and April, 1918, I was president of the Cincinnati Distributing Company, which was engaged as brokers dealing in warehouse receipts, case goods, whiskey, brandies and gins. I had been connected with the whiskey trade since 1907. The office of the Cincinnati Distributing Company, in March and April, 1907, was No. 370 Traction Building, Cin-

(Deposition of Lewis S. Rosenstein.)

cincinnati, Ohio. I was in charge of the business of that company at that place.

The first information the company had regarding the purchase of "Old Taylor" whiskey at Los Angeles, from Sherwood & [20] Sherwood Commercial Co., was a telegram from Mr. Hellman stating that he believed he could buy 200 barrels of "Old Taylor" whiskey. This is the telegram introduced in evidence and marked "Plaintiff's Exhibit No. 1."

In reply to this telegram, plaintiff sent the telegram to Mr. Hellman, which has been introduced in evidence and marked "Plaintiff's Exhibit No. 2."

The next information that we had was the telegram from Mr. Hellman, which has been introduced in evidence, and marked "Plaintiff's Exhibit No. 3," stating that he had bought from Sherwood & Sherwood, 200 barrels of "Old Taylor" whiskey. The exact amount of the purchase was 198 barrels; one barrel being missing out of each lot. The confirmation as made by Mr. Hellman in this case, was the identical confirmation we had from Mr. Hellman and other agents of our company, with reference to other transactions. Wherever our representative has a personal interview with the seller, it is customary to have the confirmation sent through our representative, and not through the other party. This is especially true where the seller is a well-known concern. Sherwood & Sherwood were a house of long standing, and known to every dealer in the United States.

Upon receipt of the telegram from Mr. Hellman

(Deposition of Lewis S. Rosensteil.)

(Plaintiff's Exhibit No. 3), I personally sold the "Old Taylor" whiskey to the Loma Grand Company, at Chicago, at \$1.40 per proof gallon. The sale to the Loma Grand Company was made over the telephone, on March 14, 1918. Under date of March 23, 1918, the following letter was received by plaintiff from the Loma Grand Company:

Plaintiff's Exhibit No. 7.

"March 23, 1918.

Cincinnati Distributing Co.,

Cincinnati, O.

Gentlemen:

We are very pleased to receive your letter this morning, because we 'accused' Freedman & Richard of having sold us these goods.

In view of present market conditions we are especially grateful to get the lot. We are in no hurry for the papers—will be glad to have you send them along any time.

Very truly yours,

(Signed) THE LOMA GRAND COMPANY,

By H. H. KLEIN. [21]

(The foregoing letter was therefore offered in evidence by plaintiff, and admitted as "Plaintiff's Exhibit No. 7.")

The goods which we sold to the Loma Grand Company was the "Old Taylor" whiskey which we had bought from Sherwood & Sherwood. I had no other whiskey of this description to sell at that time.

The following letter was received by Cincinnati Distributing Co. from the Loma Grand Company:

(Deposition of Lewis S. Rosenstein.)

Plaintiff's Exhibit No. 8.

"March 21, 1918.

"Cincinnati Distributing Co.,
Cincinnati, O.

Gentlemen:

We are still awaiting papers on the 200 barrels of Fall 1913 and Spring 1914 'Old Taylor' purchased from you last week over the long distance telephone.

Very truly yours,

(Signed) THE LOMA GRAND CO.,

By KLEIN."

(This letter was thereupon offered in evidence by plaintiff, and admitted and marked "Plaintiff's Exhibit No. 8.")

The following day, I wrote to the Loma Grand Company that the 198 barrels of Taylor Whiskey which had been purchased by them had not yet reached us, but that as soon as they arrived we would advise them. On March 29, 1918, we received a further communication from the Loma Grand Company, inquiring when the receipts for the "Old Taylor" whiskey would arrive. On the following day, having communicated with Mr. Hellman in San Francisco, in the meanwhile, I advised the Loma Grand Company that the party from whom we had purchased the whiskey positively refused to deliver the same. Under date of April 1, we received a letter from the Loma Grand Company, stating that they must insist upon the delivery of the whiskey as ordered. We were compelled to, and did, purchase [22] sufficient whiskey to fill our contract with the

(Deposition of Lewis S. Rosenstein.)

Loma Grand Company, from the Republic Distributing Company, on April 4, 1918, at \$1.85 per proof gallon. The whiskey was actually delivered by us to the Loma Grand Company. On March 30 and April 1, 1918, the market price of "Old Taylor" whiskey of the kind which was purchased by us from Sherwood & Sherwood, was \$1.85 per proof gallon.

I think I first learned that Sherwood & Sherwood would not deliver the 198 gallons of "Old Taylor" whiskey purchased on March 14, 1918, on April 1, or possibly March 30. During March and April, of 1918, the period which generally elapsed between the date of mailing of invoices and drafts from Los Angeles to Cincinnati, was seven to ten days. A delay of even two weeks in receiving the documents in this transaction did not arouse any suspicion on my part.

Cross-examination.

The generally accepted custom in the whiskey trade is, in ninety per cent of cases, to confirm purchases over the telephone, without any written or further confirmation. This custom prevails in dealings among reputable brokerage houses. I think this was the first transaction that our firm ever had with Sherwood & Sherwood. We had heard of this firm from our traveling salesmen and the whiskey trade generally for some time prior to this transaction. They were known as one of the most reputable houses on the Coast. Since this transaction, I heard they are not what they are supposed to be. On investigation, I learned of parties in Louisville holding similar claims to this one of ours. We could hardly

(Deposition of Lewis S. Rosenstein.)

be expected to have required a form of confirmation from Sherwood & Sherwood in this transaction. The wire from Mr. Hellman stated that we could buy 200 barrels of whiskey at this price. Naturally, when we wired Mr. Hellman that we would take the whiskey at that price, we thought that the deal was completed. [23]

It would be very unusual to pay cash in a transaction of this kind. We always purchased our whiskey with the papers attached to a draft which was to be presented at the First National Bank of Cincinnati and this was generally known to the trade. This was the usual procedure in transactions of this character. The fact that no word was received from Sherwood & Sherwood for more than ten days after Mr. Hellman had wired that the whiskey was purchased, gave me no concern. I would have waited for two weeks longer before making any inquiry, had I not met Mr. C. B. Baker, a whiskey broker, who informed me that he had purchased this same whiskey from Sherwood & Sherwood around the 16th or 17th of the month at a slight advance in price. As soon as he told me this, I wired Mr. Hellman to get the whiskey. When I sold the Loma Grande Company the 200 barrels of whiskey, I thought that I was selling them the whiskey I purchased from Sherwood & Sherwood. In the original telegram from Mr. Hellman, it referred to 200 barrels. It was not until his second telegram that I learned that

it was 198 barrels, and I immediately corrected my offer to the Loma Grande people.

Plaintiff thereupon rested.

Defendant thereupon moved for a nonsuit upon the ground that under the statute of frauds of the State of California, an agreement for the sale of goods in excess of the value of \$200, must be in writing, unless the buyer accepts or receives a part of the goods or pays at the time of the agreement some part of the purchase price; that in the present case, it appears that the merchandise sold was in excess of the value of \$200 and that no portion of the same was delivered, nor was any portion of the purchase price paid; that the agreement which plaintiff attempted to prove in this action rested in parol and that no memorandum sufficient to take the same out of the operation of the statute of frauds was introduced in evidence.

The Court thereupon granted said motion for nonsuit. [24]

To this ruling, plaintiff then and there excepted, and now designates said exception as

PLAINTIFF'S EXCEPTION No. 1.

Thereupon and pursuant to said order granting said motion for nonsuit, judgment was entered in favor of defendant and against plaintiff for defendant's costs of suit.

And to the judgment heretofore rendered as aforesaid, plaintiff then and there excepted and now designates said exception as

PLAINTIFF'S EXCEPTION No. 2.

Now, within the time allowed by law and stipulation of counsel, plaintiff presents the foregoing as its proposed bill of exceptions in the above-entitled action and prays that the same may be settled and allowed.

Dated: July 15th, 1920.

GOLDMAN & ALTMAN,
Attorneys for Plaintiff. [25]

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California, Second Division.

No. 16,152.

CINCINNATI DISTRIBUTING COMPANY, a
Corporation,

Plaintiff,

vs.

SHERWOOD & SHERWOOD COMMERCIAL
CO., a Corporation,

Defendant.

Stipulation for Allowance of Bill of Exceptions.

It is hereby stipulated and agreed that the foregoing bill of exceptions was presented by plaintiff within the time allowed by law therefor and that the same is a true and correct copy of the proceedings had at the trial of the above-entitled action and that the same may be certified, allowed and settled as provided by law and the practice of this court.

Dated: August 4th, 1920.

LUCIUS L. SOLOMONS,

FRED C. PETERSON,

Attorneys for Defendants.

GOLDMAN & ALTMAN,

Attorneys for Plaintiff.

Order Settling and Allowing Bill of Exceptions.

I, the undersigned, judge of the District Court of the United States, who presided at the trial of the above-entitled [26] action, do hereby certify that the foregoing bill of exceptions having been presented by plaintiff within the time allowed by law therefor, is a true and correct copy of the proceedings had at the trial of said action and do hereby settle and allow the same and order that said bill of exceptions be filed with the clerk of said court.

Dated: August 10th, 1920.

FRANK H. RUDKIN,

District Judge.

Receipt of a copy of the within proposed bill of exceptions admitted this 15th day of July, 1920.

LUCIUS L. SOLOMONS and

F. C. PETERSON,

Attorneys for Defendant.

[Endorsed]: Filed Aug. 10, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [27]

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California, Second Division.

No. 16,152.

CINCINNATI DISTRIBUTING COMPANY, a
Corporation,

Plaintiff,

vs.

SHERWOOD & SHERWOOD COMMERCIAL
CO., a Corporation,

Defendant.

Petition for Writ of Error.

Cincinnati Distributing Company, a corporation, plaintiff in the above-entitled action, feeling itself aggrieved by the judgment entered herein on the 7th day of May, 1920, comes now by Messrs. Goldman & Altman, its attorneys, and petitions said Court for an order allowing said plaintiff to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals, for the 9th Circuit, under and in accordance with the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the said plaintiff shall give and furnish upon such writ of error and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals for the 9th Circuit.

And your petitioner will ever pray.

Dated: August 10th, 1920.

GOLDMAN & ALTMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 10, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [28]

(Title of Court and Cause.)

Assignments of Error.

Now comes the plaintiff above named and files the following assignments of error upon which it will rely upon its prosecutions of the writ of error in the above-entitled action:

(1) That the above-named District Court erred in granting defendant's motion for nonsuit, which ruling is designated in the bill of exceptions herein as Plaintiff's Exception No. 1.

(2) That the said District Court erred in rendering its decision in favor of defendant and against plaintiff, for the reason that said decision is against law.

(3) That said District Court erred in rendering judgment in favor of defendant and against plaintiff, for the reason that said judgment is contrary to the evidence and the law applicable thereto.

WHEREFORE, plaintiff prays that the judgment of the District Court of the United States in and for the Southern Division of the Northern District of the State of California, Second Division, be reversed, and that said cause may be remanded to said United States District Court for a new trial.

Dated: August 10th, 1920.

GOLDMAN & ALTMAN,
Attorneys for Plaintiff.

Receipt of a copy of the within assignments of error admitted this 10th day of August, 1920.

LUCIUS L. SOLOMONS,
FRED C. PETERSON,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 10, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California, Second Division.

No. 16,152.

CINCINNATI DISTRIBUTING COMPANY, a
Corporation,

Plaintiff,

vs.

SHERWOOD & SHERWOOD COMMERCIAL
CO., a Corporation,

Defendant.

**Order Allowing Writ of Error and Fixing Amount
of Bond.**

Upon motion of Richard S. Goldman, Esq., one
of the attorneys for plaintiff in the above-entitled
action, and upon filing a petition for writ of error
and an assignment of errors,—

IT IS HEREBY ORDERED that a writ of error
be and it is hereby allowed to have reviewed in the

United States Circuit Court of Appeals for the 9th Circuit the judgment heretofore entered herein on the 7th day of May, 1920, and that the amount of the bond on said writ of error be and the same is hereby fixed at the sum of \$300.00, said bond to be served as a cost bond and a supersedeas bond on said writ of error.

Dated: August 10th, 1920.

FRANK H. RUDKIN,
United States District Judge.

[Endorsed]: Filed Aug. 10, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [30]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
That we, Cincinnati Distributing Co., a corporation,
as principal, and National Surety Company, a corporation, as surety are held and firmly bound unto Sherwood & Sherwood Commercial Co., a corporation in the full and just sum of three hundred (\$300.00) dollars, to be paid to the said Sherwood & Sherwood Commercial Company, a corporation, or its certain attorney, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors or assigns jointly and severally, by these presents.

Scaled with our seals and dated this 10th day of August in the year of our Lord one thousand nine hundred and twenty.

WHEREAS, lately at a District Court of the United States for the Northern District of Cali-

fornia in a suit depending in said court, between Cincinnati Distributing Co., a corporation, plaintiff, and Sherwood & Sherwood Commercial Company, a corporation, defendant a judgment was rendered against the said plaintiff and the said plaintiff having obtained from said court a writ of error to reverse the said judgment in the aforesaid suit, and a citation directed to the said defendant citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the said plaintiff shall prosecute such writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

CINCINNATI DISTRIBUTING CO. [Seal]

By RICHARD S. GOLDMAN,

Its Attorney.

NATIONAL SURETY COMPANY,

By E. S. HELLER,

Resident Vice-President. [Seal]

Attest: F. J. CRISP, [Seal]

Resident Asst. Secty.

[Seal National Surety Co.] [31]

State of California,

City and County of San Francisco,—ss.

On this tenth day of August, in the year one thousand nine hundred and twenty, before me, Julius

Calmann, a notary public in and for the said City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared E. S. Heller and F. J. Crisp known to me to be the resident vice-president and resident assistant secretary, respectively, of the National Surety Company, the corporation described in, and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the corporation therein named, and they acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal]

JULIUS CALMANN.

Notary Public in and for the City and County of
San Francisco, State of California.

Form of bond and sufficiency of sureties approved.

FRANK H. RUDKIN,

Judge.

[Endorsed]: Filed Aug. 10, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [32]

(Title of Court and Cause.)

Praeceptum for Record on Writ of Error.

To the Clerk of Said Court:

Sir: Please prepare record on writ of error to include the following papers:

Complaint.

Answer.

Judgment.

Bill of exceptions.

Assignments of error.

Petition for writ of error.

Order allowing writ of error and fixing bond.

Writ of error.

Citation on writ of error.

Bond on writ of error.

GOLDMAN & ALTMAN,
Attorneys for Plaintiffs in Error.

[Endorsed]: Filed Aug. 11, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [33]

In the Southern Division of the United States Dis-
trict Court, in and for the Northern District of
California, Second Division.

No. 16,152.

CINCINNATI DISTRIBUTING COMPANY, a
Corporation,

Plaintiff,

vs.

SHERWOOD & SHERWOOD COMMERCIAL
COMPANY, a Corporation,

Defendant.

Clerk's Certificate to Record on Writ of Error.

I, Walter B. Maling, clerk of the District Court
of the United States, for the Northern District of

California, do hereby certify the foregoing thirty-three (33) pages, numbered from 1 to 33, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$14.00; that said amount was paid by the attorneys for the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 26th day of August, A. D. 1920.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern
District of California. [34]

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to
the Honorable, the Judges of the District Court
of the United States for the Northern District
of California, Second Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Cincinnati Distributing Co., a corporation,

plaintiff in error, and Sherwood & Sherwood Commercial Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said Cincinnati Distributing Company, a corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 10th day of August, in the year of our Lord one thousand nine hundred and twenty.

[Seal]

WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

FRANK H. RUDKIN,

United States District Judge.

Receipt of a copy of the within writ of error admitted this 10th day of August, 1920.

LUCIUS L. SOLOMONS,

FRED C. PETERSON,

Attorneys for Defendant.

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

[Seal]

WALTER B. MALING,

Clerk United States District Court, Northern District of California.

[Endorsed]: No. 16,152. United States District Court for the Southern Division, Northern District of California, Second Division. Cincinnati Distributing Co., Plaintiff in Error, vs. Sherwood & Sherwood Commercial Co., Defendant in Error. Writ of Error. Filed Aug. 11, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [35]

Citation on Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States, to Sherwood &
Sherwood Commercial Co., a Corporation,
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Southern Division of the Northern District of California, Second Division, wherein Cincinnati Distributing Co., a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. RUDKIN, United States District Judge for the Eastern District of Washington, assigned to hold and holding United States District Court, Northern District of California, this 10th day of August, A. D. 1920.

FRANK H. RUDKIN,
United States District Judge.

Receipt of a copy of the within citation on writ of error admitted this 10th day of August, 1920.

LUCIUS L. SOLOMONS,
FRED C. PETERSON,
Attorneys for Defendant.

[Endorsed]: No. 16,152. United States District Court for the Southern Division, Northern District of California, Second Division. Cincinnati Distributing Co., Plaintiff in Error, vs. Sherwood & Sherwood Commercial Co., Defendant in Error. Citation on Writ of Error. Filed Aug. 11, 1920. W. B. Mal-ling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[36]

[Endorsed]: No. 3545. United States Circuit Court of Appeals for the Ninth Circuit. Cincinnati Distributing Company, a Corporation, Plaintiff in Error, vs. Sherwood & Sherwood Commercial Com-pany, a Corporation, Defendant in Error. Tran-script of Record. Upon Writ of Error to the South-ern Division of the United States District Court of the Northern District of California, Second Division.
Filed August 27, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3545

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CINCINNATI DISTRIBUTING COMPANY (a corporation),

Plaintiff in Error,

vs.

SHERWOOD & SHERWOOD COMMERCIAL Co.
(a corporation),

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

RICHARD S. GOLDMAN,
JOHN C. ALTMAN,
Attorneys for Plaintiff in Error.

FILED

OCT 13 1920

F. D. MONCKTON,

CLERK

No. 3545

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CINCINNATI DISTRIBUTING COMPANY (a corporation),

Plaintiff in Error,

vs.

SHERWOOD & SHERWOOD COMMERCIAL Co.

(a corporation),

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This action was commenced in the District Court by plaintiff in error to recover the sum of \$5272.75, which it claimed as damages for breach of a contract for the sale and delivery of merchandise made by it with the defendant. The action was tried before a court sitting with a jury and at the conclusion of plaintiff's case, a motion for non-suit, on behalf of defendant, was granted, and judgment accordingly entered in its favor.

The following assignments of error are relied upon by plaintiff:

(1) That the District Court erred in granting the motion for non-suit, to which exception was taken at the trial.

(2) That the decision of the District Court is against law.

(3) That the decision of the District Court is contrary to the evidence and law applicable to the case.

Each of these assignments involves the same question, namely, as to whether the granting of the non-suit was proper.

The facts of this case, as disclosed by the record, are as follows:

On March 14, 1918, S. L. Hellman, an officer and representative of plaintiff in error, had a conversation over the telephone with Harry Lieb, the managing head of the defendant corporation. Hellman testified upon this subject as follows:

“I purchased two hundred barrels of Old Taylor Whiskey on advice from the Cincinnati office (of plaintiff corporation). I purchased one hundred barrels of the ‘fall of 1913’ at \$1.32½ and 100 barrels of the ‘spring of 1914’ at \$1.35, less all charges to date and two per cent commission. I was acting for the Cincinnati Distributing Co. I purchased this whiskey at \$1.32½ and \$1.35 per proof gallon, as shown by the warehouse receipt, which always has marked thereon the number of gallons of each barrel purchased.

* * * * *

I called Mr. Lieb up over the telephone at 4 o'clock. He told me he had concluded to let

me have the goods at \$1.35 per proof gallon, less charges and commission. I then informed him that I would not purchase it at that price because I had purchased goods of similar description with a difference of 5 cents per gallon between the 13 and 15 ages, but that in this instance I was willing to take them at a difference of $2\frac{1}{2}$ cents and offered him \$1.32 $\frac{1}{2}$ for the 'fall of 1913' and \$1.35 for the 'spring of 1914.' After a moment's hesitation, he said 'very well, I will take it,' and I said immediately 'I wish you would wire confirmation to our Cincinnati office,' and he replied, saying 'I am ready to leave the office. There is some one waiting for me and I cannot take the time. Will you make this confirmation yourself for me?' * * * After this conversation, I immediately wired confirmation to the Cincinnati Distributing Company of this lot of whiskey."

The telegram on confirmation referred to by the witness is as follows (plaintiff's Exhibit No. 3):

"Los Angeles, Calif., Mar. 14, 1918.
The Cincinnati Distributing Co.,
607 Traction Building,
Cincinnati, Ohio.

Bought ninety-nine each fall thirteen spring
fourteen Taylor one thirty-two half thirty-five
less commission.

(Signed) S. L. Hellman."

With reference to the fact that the wire of confirmation called for only one hundred and ninety-eight barrels, instead of two hundred, the witness testified:

"There was one barrel short in each of the lots by reason of the fact that there was an excessive outage in one barrel of the 13's and one barrel of the 14's. This reduced the total amount to 198 barrels."

Mr. Hellman's testimony with reference to the circumstances surrounding the placing of the order is corroborated by Samuel Davis, though, for the purposes of this appeal, such corroboration is unnecessary, as Mr. Hellman's testimony stands uncontradicted upon the record. The rule in cases where a non-suit is granted, is that if there is any testimony to support the allegations of the complaint or to justify a judgment in favor of plaintiff, the judgment must be reversed.

Mr. Davis, a traveling salesman, was in the office of Sherwood & Sherwood at the time of the telephone conversation between Mr. Lieb and Mr. Hellman. He stated that

"I heard Mr. Lieb say to Mr. Hellman that he could consider the sale made at \$1.35 and that he was leaving the office to go downtown."

When questioned as to how he knew that Mr. Lieb was talking to Mr. Hellman, he testified that Mr. Lieb

"stated to me right after the conclusion of the conversation that he was talking to a friend of mine and I asked him who and he said Sid Hellman."

Upon receipt of the telegram of Mr. Hellman (plaintiff's Exhibit No. 3), the home office of the plaintiff corporation immediately sold the 198 barrels of whiskey to the Loma Grand Company at \$1.40 per proof gallon. The president of the company testified:

“Upon receipt of the telegram from Mr. Hellman (Plaintiff’s Exhibit No. 3) I personally sold the Old Taylor Whiskey to the Loma Grand Company, Chicago, at \$1.40 per proof gallon. The sale to the Loma Grand Company was made over the telephone on March 14, 1918.”

Two weeks after this transaction was completed, plaintiff, having received no word from Mr. Hellman or Sherwood & Sherwood with reference to this whiskey, telegraphed Mr. Hellman, who was then in San Francisco, to ascertain why shipment of the same had been delayed. Mr. Hellman immediately communicated with Mr. Lieb, who then advised him that he would not deliver the whiskey. Upon receipt of this information, Mr. Hellman communicated the same to the home office of plaintiff, which information reached plaintiff on April 1, 1918, upon which date it was compelled to and did purchase in the open market 198 barrels of Old Taylor Whiskey in order to fulfill its obligation to the Loma Grand Company. This whiskey was purchased at \$1.85 per proof gallon. The amount which plaintiff sued for in this action was the difference between the price paid by it for the whiskey on April 1st, when it received word of the repudiation of the contract by Sherwood & Sherwood, and the contract price of \$1.32½ and \$1.35 per proof gallon.

The ground upon which the trial court granted the motion for non-suit was that the contract between the parties in this action was one which by the statute of frauds was required to be in writing

and that there was no memorandum of the transaction sufficient to take it out of the operation of the statute.

The position of the plaintiff in error with reference to the applicability of the statute of frauds is, that while it is conceded that the contract in question is one for the sale of merchandise over the value of \$200 and is therefore within the operation of the statute, the telegram which is above set forth, is a sufficient compliance with the requirements of the statute. The testimony in this case is that Mr. Hellman was authorized by Mr. Lieb to send the telegram and for that purpose, he was the agent of defendant in error and the telegram sufficiently sets forth the transaction to take it out of the operation of the statute of frauds.

It will probably be contended by defendant that the telegram sent by Mr. Hellman to the Cincinnati Distributing Company announcing the purchase of the whiskey is insufficient as a memorandum to take the case out of the statute of frauds, for the reason that the telegram does not specify from whom the purchase was made, but in this connection, we desire to direct the Court's attention to plaintiff's Exhibits 1 and 2. The first of these exhibits was a telegram from Hellman to the Cincinnati Distributing Company announcing that Sherwood would sell the whiskey, and Exhibit 2 is a reply from the Cincinnati Distributing Company directing Hellman to purchase the whiskey from Sherwood. These three telegrams, which were written

on March 13th and March 14, 1918, taken together, conclusively indicate that the final message from Hellman referred to the whiskey of defendant. The telegram, therefore, contains all of the essential requirements of a memorandum sufficient to take the present case out of the operation of the statute of frauds.

This position is sustained in the case of *Brewer v. Horst*, 127 Cal. 643, wherein it was stated:

“The court is permitted to interpret the memorandum by the light of all the circumstances under which it was made; and if when the court is put into possession of all the knowledge which the parties to the transaction had at the time, it can be plainly seen from the memorandum who the parties to the contract were, what the subject of the contract was, and what were its terms, then the court should not hesitate to hold the memorandum sufficient. Oral evidence may be received to show in what sense figures or abbreviations were used. * * * Parol evidence is always admissible to explain the surrounding circumstances and situation and relations of the parties at and immediately before the execution of the contract in order to connect the description with the only thing intended and thereby to identify the subject matter and to explain all terms and phrases used in a local or special sense.”

But, assuming that this Court should determine that the memorandum is insufficient to take the contract out of the operation of the statute of frauds, plaintiff in error contends that defendant is estopped from asserting the statute of frauds as a defense to this action.

A very complete discussion of the circumstances under which a party defendant to an action may be held estopped to assert the statute of frauds as a defense to an action upon a contract is contained in *Seymour v. Oelrichs*, 157 Cal. 782. The right to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing fraud, is in that case held to be beyond dispute. The Court said:

“It is based upon the principle thoroughly established in equity and applying in every transaction where the statute is involved, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting or aiding a party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme.”

The following quotation from *Glass v. Hulbert*, 102 Mass. 24, is set forth and approved:

“The fraud most commonly treated as taking an agreement out of the statute of frauds, is that which consists in setting up the statute against its enforcement after the other party has been induced to make expenditures or a change of situation in regard to the subject matter of the agreement or upon the supposition that it was to be carried into execution and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.”

The general principle involved in the foregoing is expressed in *Dickerson v. Colgrove*, 100 U. S. 580, as follows:

“The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood and the law abhors both.”

Plaintiff in error contends that this principle is applicable to the case at bar. Assuming, as we must, upon this appeal that the testimony of Mr. Hellman is correct that Mr. Lieb orally advised him that he would sell and deliver 198 barrels of Old Taylor whiskey at from \$1.32½ to \$1.35 per proof gallon, the resale of this whiskey by plaintiff in error upon receiving information of the purchase of the same, was such a change of position on its part as is contemplated by the statute. Relying upon the assurance of Mr. Lieb that the whiskey would be delivered forthwith, it obligated itself to deliver this whiskey to a third party and was in fact compelled, upon the repudiation of the contract by defendant, to purchase the same in the open market at an advanced price and a loss to itself of over \$5000. Under these circumstances, to permit defendant to assert the statute of frauds as a defense to the action upon the contract, would constitute a fraud upon plaintiff, the very thing which the statute of frauds was aimed to prevent. It is clear that plaintiff in error would not have contracted to sell this

whiskey to the Loma Grand Company of Chicago, were it not for the assurance of Mr. Lieb that this whiskey would be delivered to it by defendant in error. We may well ask under these circumstances, as did the Court in the case of *Seymour v. Oelrichs*, *supra*:

“Is it permissible to them in view of the well settled principle of law stated, to so repudiate the contract by interposing the fact that it has not been reduced to writing as promised, as a defense to this action?”

It is not necessary that actual fraud on the part of defendant in error be shown, nor that it agreed to deliver the whiskey with intent to interpose the statute of frauds as a defense, in the event that plaintiff in error attempted to enforce the oral obligation. All that is necessary, as was said in *Anderson v. Hubble*, 93 Ind. 570, is that

“the person against whom the estoppel is asserted, must by his silence or his representation have created a belief of the existence of a state of facts which it would be unconscionable to deny. * * * All that is meant in the expression that an estoppel must possess an element of fraud, is that the case must be one in which circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon.”

It is respectfully submitted that defendant in error by its direct representation that it would sell and deliver to plaintiff in error one hundred and ninety-eight barrels of Old Taylor Whiskey at

prices ranging from \$1.321½ to \$1.35 per proof gallon, induced plaintiff in error to believe that it intended to deliver that whiskey and that plaintiff in error in good faith and relying upon this representation, resold the same and was compelled by reason of the subsequent repudiation of the contract on the part of defendant in error, to purchase a sufficient quantity of whiskey in the open market to fulfill its obligation, to its detriment and loss.

For the reasons herein expressed, we respectfully submit that the judgment of non-suit was erroneously granted and that the case should be remanded for a new trial, so that the issue as to whether or not Mr. Lieb did represent to plaintiff in error that his company would sell to plaintiff the whiskey in controversy, be determined and resolved.

Dated, San Francisco,

October 11, 1920.

Respectfully submitted,

RICHARD S. GOLDMAN,

JOHN C. ALTMAN,

Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CINCINNATI DISTRIBUTING COMPANY (a
corporation),

Plaintiff in Error,

VS.

SHERWOOD & SHERWOOD COMMERCIAL CO.
(a corporation),

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

LUCIUS L. SOLOMONS,

FRED C. PETERSON,

Attorneys for Defendant in Error.

FRANK ORWITZ,

of Counsel.

Filed this.....day of October, 1920.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

FILED

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U. S. CIRCUIT COURT

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CINCINNATI DISTRIBUTING COMPANY (a
corporation),

Plaintiff in Error,

VS.

SHERWOOD & SHERWOOD COMMERCIAL CO.
(a corporation),

Defendant in Error.

No.
3545.

BRIEF FOR DEFENDANT IN ERROR

—

This action was commenced in the District Court by plaintiff in error to recover the sum of five thousand two hundred and seventy-two dollars and seventy-five cents (\$5272.75) which is claimed by plaintiff in error as damages for breach of the contract for the sale and delivery of merchandise described in the complaint. Defendant below, defendant in error here, made a motion for non suit, which was granted. This ruling of the Court and the judgment which followed it are the errors complained of herein.

In view of the fact that plaintiff in error here was plaintiff below, and that defendant in error here was defendant below, we shall hereafter refer to the parties by the names of plaintiff and defendant.

Defendant has no criticism to make of the statement of facts set out by plaintiff in its brief. In view of the fact that plaintiff's Exhibits 1, 2 and 3 are the key to the solution of the questions presented on this appeal, we shall print herein these exhibits *in extenso*.

It will be noticed that Exhibit 1 is a telegram sent by S. L. Hellman to the Cincinnati Distributing Company on the 13th day of March, 1918, and that it reads as follows (Trans. p. 15):

“The Cincinnati Distg. Co.,
Cincinnati, O.

Sherwood will sell hundred spring fourteen hundred fall fourteen Old Taylor. If you want in addition to Melezer purchase believe one thirty five for fourteen one thirty two half for thirteen less commission would buy. Wire fast message either way. Offer less draft through Muellenkamp or any direct buyer.

(Signed)

S. L. HELLMAN.”

That at noon of the following day the said S. L. Hellman received in reply to his telegram, Exhibit 1, Exhibit Number 2 (Trans. p. 16):

"Cincinnati, O., Mar. 14, 1918.

Sidney L. Hellman,
Cr. Vannuys Hotel,
Los Angeles, Calif.

Buy Sherwood Taylor at prices your wire or better. Fall thirteens spring fourteen. Wire quick.

(Signed) CINCINNATI DISTRIBUTING CO."

That according to the testimony of witness Hellman, the deal for the sale of the whiskey was concluded between him and the defendant subsequent to the sending and receipt, respectively, of said Exhibits 1 and 2. That Exhibit 3, which is as follows (Trans. p. 16):

"Los Angeles, Calif.,
Mar. 14, 1918.

The Cincinnati Distributing Co.,
607 Traction Bldg.,
Cincinnati, O.

Bought ninety nine each fall thirteen spring fourteen Taylor. One thirty two half thirty five less commission.

(Signed) S. L. HELLMAN."

was sent by Hellman to the Cincinnati Distributing Company.

Hellman's testimony with regard to the sending of the said Exhibit 3 is set forth in the transcript at pages 12 and 13. We copy here that portion of the testimony which is set out by plaintiff on pages 2 and 3 of its brief, as follows:

"I called Mr. Lieb up over the telephone at 4 o'clock. He told me he had concluded to let

me have the goods at \$1.35 per proof gallon, less charges and commission. I then informed him that I would not purchase it at that price because I had purchased goods of similar description with a difference of 5 cents per gallon between the 13 and 15 ages, but that in this instance I was willing to take them at a difference of $2\frac{1}{2}$ cents and offered him $\$1.32\frac{1}{2}$ for the 'fall of 1913' and \$1.35 for the 'spring of 1914.' After a moment's hesitation, he said 'very well, I will take it,' and I said immediately 'I wish you would wire confirmation to our Cincinnati office,' and he replied, saying 'I am ready to leave the office. There is some one waiting for me and I cannot take the time. Will you make this confirmation yourself for me? After this conversation, I immediately wired confirmation to the Cincinnati Distributing Company of this lot of whiskey.'"

It will be noticed that this entire conversation, as claimed by the witness Hellman, took place over the telephone; and that there was no writing involved in it in any manner.

Counsel for plaintiff concedes that there is but one question involved in this case, namely, the "applicability of the statute of frauds." In this regard plaintiff makes two points; the first is that Exhibits 1, 2 and 3 constitute when construed together a valid memorandum under the statute, and the second point, that irrespective of whether or not a valid memorandum exists in the case, that defendant is estopped from pleading the statute of frauds because of an alleged change of position on the part of plaintiff.

ARGUMENT

Defendant makes and will demonstrate herein the following propositions:

1. That the Statute of Frauds is properly an issue herein under the pleadings.

2. That Exhibits 1, 2 and 3 do not and cannot constitute a valid memorandum under the Statute of Frauds.

a. That the authority of Hellman to bind by the sending of Exhibits 1, 2 and 3 or any of them was in parol and is invalid under Section 2309 of the Civil Code of the State of California.

b. That the principle of Brewer vs. Horst (127 Cal. 643) is inapplicable to the case at bar.

c. That Exhibit 3 does not comply with the requirements of a valid memorandum under the statute.

3. That defendant is not estopped from pleading the Statute of Frauds.

1. That the Statute of Frauds Is Properly an Issue Herein Under the Pleadings.

The complaint (Par. III, Trans. p. 1) sets up a contract of sale and purchase. The answer (Par. III, Trans. p. 4) specifically denies the execution of said contract.

To the introduction of the Exhibits 1, 2, 3 and 4 (Trans. p. 15) defendant objected as follows:

“To the introduction of said exhibit, as well as Plaintiff’s Exhibits 2, 3 and 4 hereinafter set forth, defendant objected on the ground that said exhibits, and each of them, were irrelevant, incompetent, immaterial, hearsay and insufficient to constitute a valid contract or memorandum thereof under the statute of frauds.”

A denial of the execution of a contract permits of the objection that the contract is within the terms of the statute of frauds.

Tierney vs. Howard, 79 Cal. 525;

Walsh vs. Standard, 174 Cal. 807.

2. That Exhibits 1, 2 and 3 Do Not and Cannot Constitute a Valid Memorandum Under the Statute of Frauds.

a. That the authority of Hellman to bind by the sending of Exhibits 1, 2 and 3 or any of them was in parol and was invalid under Section 2309 of the Civil Code of the State of California.

The testimony clearly shows that all of the alleged conversation between Hellman, representing the plaintiff, and Lieb, representing the defendant, was over the telephone.

Counsel for plaintiff state in their brief, page 6:

“The testimony in this case is that Mr. Hellman was authorized by Mr. Lieb to send the telegram and for that purpose he was the agent of defendant in error and the telegram sufficiently sets forth the transaction to take it out of the operation of the statute of frauds.”

We reply:

“An oral authorization is sufficient for any purpose except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing.”

Civil Code, Sec. 2309.

“The following contracts are invalid, unless the same, or some note or memorandum

thereof, is in writing and subscribed by the party to be charged, or by his agent:

4. An agreement for the sale of goods, chattels or things in action, at a price not less than 'two hundred dollars.....'"

Civil Code, Sec. 1624.

"No sale of personal property, or agreement to buy or sell it for a price of two hundred dollars or more, is valid, unless:

One. The agreement or some note or memorandum thereof be in writing, and subscribed by the party to be charged, or by his agent."

Civil Code, Sec. 1739.

The Supreme Court of the State of California was considering the authority of a husband to bind his wife in a certain exchange of real property. The Court uses the following language in connection therewith:

"When plaintiff Arthur Mason contracted to make the exchange the property was the separate property of his wife, Ada. The only authority he had to deal with it was oral, and in law was no authority at all. (*Civil Code* secs. 1624 (subdivision 5), 2309. *Salfield vs. Sutter County, etc. Co.*, 94 Cal. 546.)"

Mason vs. Lincle, 143 Cal. 363, 366.

The Supreme Court had before it in the case of *Seymour vs. Oelrichs* (156 Cal. 782) a question of the oral authorization of an agent to bind his principal to a contract, which under the statute of frauds must itself be in writing. In the *Seymour*

case, *supra*, the contract involved was that of the employment of a person for a period of more than one year. The Court uses the following language:

“It is claimed by the appellant that the record contains no evidence showing any authority on the part of either Charles L. Fair or Herman Oelrichs (the alleged agents) to bind Mrs. Oelrichs and Mrs. Vanderbilt (the alleged principals) by any such contract as found by the Court. We think this contention is sound and must be sustained. The contract was one which, as we have seen, was required to be in writing, and under Section 2309 of the Civil Code ‘an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing.’ (*Mason vs. Lincle*, 143 Cal. 363.)”

Seymour vs. Oelrichs, 156 Cal. 782, 788.

This proposition is in itself conclusive of the argument that Exhibits 1, 2 and 3 constitute a valid memorandum under the statute of frauds.

b. That the principle of *Brewer vs. Horst* (127 Cal. 643) is inapplicable to the case at bar.

If we were to assume for argument’s sake that Mr. Hellman had a valid authority to bind the defendant in the case by the sending of the telegrams (a proposition which we have conclusively shown to be incorrect) we would be brought to a consideration of plaintiff’s argument that the three exhibits should be considered as one.

For the purpose of this argument plaintiff has cited *Brewer vs. Horst*, 127 Cal. 643. The facts

of *Brewer vs. Horst* were as follows: Brewer was a hopgrower and Horst and Lachmund Company was a firm with headquarters in Santa Rosa, State of California. The transactions in question occurred at Sacramento. An oral contract was entered into between one Wagner, the agent of Horst and Lachmund, and Brewer for the sale of certain hops. Before the entering into of this contract Wagner had taken samples of the hops and had marked the samples by the trade symbol "13;" that after the consummation of the oral transaction, Wagner, the agent of Horst, sent a telegram from Sacramento to Santa Rosa addressed to Horst, as follows:

"Bought thirteen at eleven five-eighths net you; confirm purchase by wire to Brewer . . ."

That in reply thereto Horst and Lachmund Company from Santa Rosa sent the following telegram to Brewer, the owner of the hops:

"We confirm purchase Wagner eleven five-eighths cents, like sample."

The Court held that parol evidence was admissible to show the technical sense in which the word "thirteen" was used in the telegram, and that it was known to both parties to the transaction to designate a definite and certain quantity of hops. It was in connection with these specific facts that the Court used the language in its decision quoted by plaintiff on page 7 of its brief.

An examination of the facts in the case at bar shows how far removed the instant case is from *Brewer vs. Horst*.

According to the testimony (Trans. pp. 13 and 14) Hellman had a preliminary conversation with Lieb on the 13th of March, 1918. As a result of this preliminary conversation without any instructions, oral, written or otherwise from Lieb, Hellman sent Exhibit 1 to his house at Cincinnati. This telegram was in substance, "If you want whiskey at prices quoted, wire fast message either way." About noon of the following day, March 14th (Trans. pp. 15 and 16), Hellman received in reply plaintiff's Exhibit Number 2, which was in substance, "Buy Sherwood Taylor at prices your wire or better . . . Wire quick." These two messages were not brought to the attention of Lieb in any manner, as far as the record shows; and probably the facts were that Lieb actually had no knowledge that these two messages had ever been sent. The first two exhibits were pure hearsay, as far as the defendant was concerned. By no stretch of the imagination can it be said that a review of these two exhibits can be resorted to for the purpose of showing to the Court "all the knowledge which the parties to the transaction had at the time," for the obvious reason that there is no knowledge brought home to the defendant of the existence or the contents of said Exhibits 1 and 2.

We do not dispute the principle of law laid down in *Brewer vs. Horst*, but we most respectfully

maintain that it can have no application here when it sought to use the case of *Brewer vs. Horst* as a means of compelling the Court to resort to telegrams under the circumstances of the case at bar. All of the parties to the transaction in *Brewer vs. Horst* were using the word "thirteen" in a technical sense in accordance with the usage and custom of the hop trade. This usage and custom of the hop trade was proven in the case and it was merely a resort by the Court to parol testimony to interpret what would otherwise be an uncertainty in a written instrument by applying to the instrument the facts that were within the knowledge of both parties at the time of the transaction. As the Court said in that case:

"Parol evidence is always admissible to explain the surrounding circumstances and situations and relations to the parties at and immediately before the execution of the contract, in order to connect the description with the only thing intended, and thereby to identify the subject matter and to explain all terms and phrases used in a local or special sense."

That other Courts have placed the limitation of knowledge of the parties upon the parol evidence admitted to connect documents for the purposes of the statute of frauds, see discussion in decision of Supreme Court of Massachusetts, from which we quote:

"The old rule, by which no other paper could be used to help out the memorandum unless

incorporated into it by reference in the memorandum itself (*Morton vs. Dean*, 13 Metc. 385; *Boardman vs. Spooner*, 13 Allen 353, 90 Am. Dec. 196) is no longer followed. The connection between different papers, so that they may be considered together and their sufficiency be determined by the contents of all of them may be proved by oral evidence, *at least so far as it is the result of that evidence to establish the fact that all of the different papers which are so to be considered together were brought to the attention of both parties, and were linked together in their minds, so that the parties themselves may be found to have adopted all the papers as the expression of their purpose.* This is the effect of the recent cases. 'There is no doubt under the authorities,' said the present Chief Justice in *Lee vs. Butler*, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466, 'that the letter and receipt, as well as the paper containing the promise, may be used to complete the memorandum required by the statute of frauds to make the contract binding. It is also well settled that parol evidence may be introduced to show the situation of the parties and the circumstances attending the transaction, for the purpose of applying the contract to the subject matter and of showing the connection between the papers constituting the memorandum with one another.' This doctrine was applied, with a statement of both the old rule and that now followed, in *Oliver vs. Hunting*, 44 Ch. D. 205, in which Kekewich, J., uses this language: 'It is difficult perhaps to say where parol evidence is to stop, but substantially it never stops short of this, that whenever parol evidence is required to connect two documents together, then that parol evidence is admissible.' See *Lerned vs. Wannamacher*, 9 Allen 412, 416; *Freeland vs. Ritz*, 154 Mass.

257, 28 N. E. 226, 12 L. R. A. 561, 26 Am. St. Rep. 244; *Hibbard vs. Hatch Storage Battery Co.*, 174 Mass. 296, 54 N. E. 658; *Beckwith vs. Talbot*, 95 U. S. 289, 24 L. Ed. 496; *Cooper vs. Bay State Gas Co.* (C. C.), 127 Fed. 482; *Shears vs. Thimbleby*, 76 L. T. N. S. 709; *Camp vs. Moreman*, 84 Ky. 635, 2 S. W. 179; *Jenkins vs. Harrison*, 66 Ala. 345; *White vs. Breen*, 106 Ala. 159, 19 South. 59, 32 L. R. A. 127; *Strouse vs. Elting*, 110 Ala. 132, 20 South. 123; *Brewer vs. Horst & Lachmund Co.*, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240."

Nickerson vs. Weld, 90 N. E. 589, 591.

As heretofore shown, this principle can have no application to the case at bar.

As will be shown in the next subdivision of this brief, the three telegrams taken together (if such were a proper mode of construction) would not contain all of the required elements of a valid memorandum under the statute of frauds.

As we have reached the conclusion that the Exhibits 1, 2 and 3 cannot be taken together, we shall now consider Exhibit 3 alone, and test its validity as a memorandum under the statute.

c. That Exhibit 3 does not comply with the requirements of a valid memorandum under the statute.

The requirements of a memorandum under the statute of frauds have been declared in many cases in the State of California. We shall quote from a few of said cases, and then point out where Exhibit 3 fails to comply with the requirements.

The Supreme Court of the State of California has said in a leading case:

“In order to take the contract for the sale of land out of the statute of frauds, it is not necessary that there be a formal contract drawn up with technical exactness. A memorandum of the agreement is sufficient and it may be found in one or more papers, some or all of which may be telegrams. *But the memorandum must contain all the material elements of the contract; that is, it must show who is the seller and who is the buyer, what the price is and when it is to be paid, and must so describe the land that it can be identified.* (Quoting Miller, Judge, in *Grafton vs. Cummings*, 99 U. S. 106.)”

Breckinridge vs. Crocker, 78 Cal. 529, 535.

In another case before the Supreme Court of the State of California the facts were as follows: The owner of the property wrote to one Gompertz, “to try and find a purchaser for the property.” Said Gompertz procured a contract for sale for \$6150.00 from one Reed. The contract did not specify the name of the owner and was signed, “Center & Spader, by C. N. Gompertz, agent.” Subsequent to the obtaining of the signature of Reed to this contract, said Gompertz sent a telegram to the owner as follows: “Have sold house, \$6150. Wire confirmation.” In reply to this the owner wired, “Terms satisfactory.”

The Court said in reference to the foregoing facts:

“This evidence was sufficient to prove that there was neither a valid written memorandum of the alleged agreement of sale authorized or executed by Mrs. Mills, nor a sufficient part performance of an oral agreement to justify a decree for specific performance thereof under the rules in equity. The letter of Mrs. Mills to Gompertz merely authorized him to try to find a purchaser of the property. It did not purport to authorize him to execute any agreement for the sale thereof in her name or on her behalf. The telegram she sent from Arizona, approving the price offered, was communicated to her by the telegraph office over the telephone. Conceding that it is to be considered as having been signed by her, the two telegrams do not constitute sufficient evidence of an agreement to sell. ‘The memorandum must contain all the material elements of the contract; that is, it must show who is the seller and who is the buyer, what the price is and when it is to be paid, and must so describe the land that it can be identified.’ (*Breckenridge vs. Crocker*, 78 Cal. 535; *Meux vs. Hogue*, 91 Cal. 448.) The writings, taken together, do not give the name of the purchaser, do not describe the property, and do not state any of the terms of sale except the price agreed upon. They state neither the time, the terms nor the manner of payment. None of those things was ever communicated to Mrs. Mills. Her telegram approving the price cannot be deemed an affirmance of the entire contract and it did not operate to make valid the oral agreement of the persons assuming to act in her behalf.”

Fritz vs. Mills, 170 Cal. 449, 457, 458.

We quote from a decision of the District Court of Appeals as follows:

“It is well settled that no action will lie to enforce the performance of a contract, or to recover damages for its breach, unless it be complete and certain; and the rule applies as well to price as to subject-matter and parties.” *Tal-madge vs. Arrowhead R. Co.*, 101 Cal. 367, 371, 35 Pac. 1000, 1002.

“To satisfy the statute of frauds a memorandum ‘must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intentions of the parties.’ 5 Browne on Statute of Frauds, 371.” In *Breckenridge vs. Crocker*, 78 Cal. 529 (21 Pac. 179), the Court said: “The memorandum must contain all the material elements of the contract.” *Seymour vs. Oelrichs*, 156 Cal. 782, 787, 106 Pac. 88, 91 (Am. St. Rep. 154).

Wineburgh vs. Gay, 27 Cal. App. 603, 605, 150 Pac. 1003, 1005.

The same rules have been affirmed by many other California cases, among which are the following:

Hines vs. Copeland, 23 Cal. App. 36, 40, and *Albion Lumber Co. vs. Lowell*, 20 Cal. App. 782.

Exhibit 3 is in its essential terms as follows:

“The Cincinnati Distributing Co.

Bought ninety-nine each fall thirteen spring fourteen Taylor one thirty-two half thirty-five less commission.”

Applying the test of *Breckenridge vs. Crocker*, *supra*, and the other cases, we very clearly see that

this telegram does not comply with the essential requirements of a memorandum. The requirements set forth in the Breckenridge case are as follows:

First, who is the seller? As to this question the telegram, Exhibit 3, is completely silent.

Second, who is the buyer? It may possibly be presumed from the fact that the telegram is addressed to the Cincinnati Distributing Company, that the Cincinnati Distributing Company is intended as the buyer, and it might be said that it is a compliance with that requirement.

Third, what is the price? The telegram says, "one thirty-two half thirty-five less commission," without any specification as to whether one thirty-two and a half is dollars or cents or applies to barrels or to gallons of whiskey, with the same criticism concerning thirty-five, and without any specifications as to what the commission referred to is.

Fourth, when is the price to be paid? The telegram is entirely silent.

Fifth, the memorandum must so describe (the land, in the Breckenridge case) the merchandise in the instant case that it may be identified. Exhibit 3 contains the words, "bought ninety-nine each fall thirteen spring fourteen Taylor." The telegram does not state whether the ninety-nine means gallons or barrels, or what quantity, nor is there any evi-

dence in the record showing what was meant by the word "ninety-nine."

Applying the foregoing tests, it is very apparent that plaintiff's Exhibit 3 does not constitute a sufficient memorandum.

As referred to in a previous subdivision of this brief, even if for argument's sake, we were to agree that Hellman had the authority to send the telegrams and bind the defendant herein, and if we were to further concede the fact that the three telegrams should be construed together, it will be very plainly seen that even the three telegrams together do not constitute a sufficient memorandum within the meaning of the five tests laid down by the authorities.

This disposes of that portion of plaintiff's brief in which it is argued that there are facts in the record taking the case without the statute of frauds. We are now brought to plaintiff's second contention, namely, that defendant is estopped from pleading the statute of frauds.

3. That Defendant Is Not Estopped from Pleading the Statute of Frauds.

It would appear from the frequency with which the case of *Seymour vs. Oelrichs* (156 Cal. 782) is cited by persons against whom the statute of frauds is pleaded, that it has become the almost universal defense of the person who insists that, notwithstanding a lack of a written memorandum, his contract may yet be enforced. In this regard counsel for

plaintiff is no exception, and they have devoted at least one-half of their argument to a discussion of that case and the cases cited by the Supreme Court of California in that case.

The facts of the Seymour case were as follows:

“In this action the plaintiff seeks to recover the sum of \$28,500 as damages for the breach of a contract of employment. He alleges that on or about the 1st day of May, 1902, the defendants Theresa A. Oelrichs and Virginia Vanderbilt, with their brother Charles L. Fair, since deceased, were the heirs at law of James G. Fair, deceased, and the owners of his estate, consisting in large part of real property in the city and county of San Francisco. It is alleged that on or about said date the said heirs of James G. Fair entered into a contract with the plaintiff whereby it was agreed that said heirs should employ the plaintiff for the period of ten years from June 1, 1902, at a salary of \$300 a month, to act as overseer of their lands and the buildings thereon. On August 14, 1902, Charles L. Fair died and all of his interest in the property above mentioned devolved upon his sisters, Theresa A. Oelrichs and Virginia Vanderbilt. Plaintiff, as is averred, entered upon the performance of his duties under the aforesaid contract and continued in such employment until about the 29th day of June, 1904, when, without his consent the defendants Theresa A. Oelrichs and Virginia Vanderbilt refused to perform said contract any longer. Plaintiff has ever since been ready and willing to perform said contract upon his part.

The answer denies the making of the contract as alleged and avers that plaintiff was employed by the Fair heirs from month to

month only. The Court found that all of the allegations of the complaint were true except the allegation of damage, with respect to which it found that plaintiff had been damaged in the sum of \$11,500. It was further found that the contract of employment alleged by plaintiff was, in the first instance, entered into by word of mouth, but was afterwards reduced to writing subscribed by the parties to be charged thereby. The writings regarded by the Court as constituting a written memorandum or contract will be more particularly referred to hereafter. It is further found that on the 1st of May, when the original oral agreement was made, the plaintiff was holding the position of captain of detectives in the police department of the city and county of San Francisco at a salary of \$250 a month; that the heirs of James G. Fair did at that time request him to give up his position as captain of detectives and assured him that if he would do so they would give him a position for ten years upon a salary of \$36,000 payable in equal monthly payments of \$300 and would within a short time put such employment and the terms thereof in writing and sign the same. It was upon such representations and assurance, the Court finds, that plaintiff resigned his said position as captain of detectives and took service with said heirs as alleged. There is a further finding to the effect that it is not in the power of said heirs to restore to said plaintiff his status and position as captain of detectives. The defendants Theresa A. Oelrichs and Virginia Vanderbilt have continuously failed and refused to give to plaintiff any written contract as promised. Upon these findings the Court entered judgment in favor of plaintiff and against Theresa A. Oelrichs and Virginia Vanderbilt for the sum of \$11,000 with interest and costs, and said de-

defendants appeal from the judgment and from an order denying their motion for a new trial.

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In our discussion we shall assume, of course, that Mr. Oelrichs was duly authorized in writing to enter into such a contract on behalf of the defendants as is alleged to have been made by him with plaintiff. If he was so authorized, it is apparent that defendants are bound by his acts, conduct, and statements to the same extent that they would have been had they been personally present and personally had done just what he did. So assuming, the facts that plaintiff's evidence tended to show are substantially as follows: Plaintiff was captain of detectives in the police department of the City and County of San Francisco, at a salary of two hundred and fifty dollars per month. Under the law, he held practically a life position as captain of police, being removable therefrom only for good cause after trial. All this was known to the defendants and to Charles L. Fair, to whose property they have succeeded. Under these circumstances they offered him a position, wherein he was to render personal services in connection with their property in San Francisco for a compensation in money. The terms of the contract were finally agreed upon before Mr. Fair left for Europe, Mr. Fair acting for himself and Mr. Oelrichs representing the defendants. Plaintiff told them that he then had a life position, with a right to a pension if he remained long enough in the police department, and that he could not afford to leave the place and go into anything else unless he was certain of steady employment, and they then told him that they would give him a ten-year contract at three hundred dollars per month. This was assented to by plaintiff. The day before Mr. Fair left for Europe, to be absent a few weeks,

being very busy in closing up certain business affairs that had to be attended to before he left, he told plaintiff: 'Now, in regard to this contract, you leave that stand until I get back, and I will give you the contract.' Plaintiff asked him why it could not be done 'now,' and Fair told him not to be afraid, it would be all right, everything would be all right. It was understood that he was to go to work at once. On leaving Mr. Fair, plaintiff met Mr. Oelrichs and told him about his conversation with Fair, and Oelrichs said: 'As far as I am concerned I will give you my part of it now if you want it. I represent Mrs. Oelrichs and Mrs. Vanderbilt and there will be no trouble about it at all, but you might just as well leave it go until Fair returns,' and plaintiff said 'All right.' This was about June 1, 1902. Plaintiff relied absolutely upon the understanding that he was to have a written contract for ten years at three hundred dollars a month, and would not otherwise have resigned his position in the police department or entered the employ of the defendants and Fair. The morning Fair went away, he asked plaintiff when he was going to resign, and plaintiff said 'To-day,' and Fair said, 'All right, you go ahead, it will be all right, everything will be all right on my return.' He did resign at once and his new employment commenced June 1, 1902. Fair was killed near Paris, France, August 14, 1902, without having returned to America. Plaintiff continued to perform all services agreed to be rendered and received three hundred dollars a month therefor to July 1, 1904, when defendants, having determined to sell all their San Francisco property, discharged all of their employees, including plaintiff, and have ever since refused to recognize him as an employee or pay him any portion of the salary agreed upon.

Plaintiff had no intimation that either Mrs. Oelrichs or Mrs. Vanderbilt did not know all about the terms upon which he entered their employ until November, 1903, when an attempt, which was not persisted in, was made to reduce his salary; Mrs. Oelrichs on November 30, 1903, told him that Mr. Oelrichs had no right to make such an arrangement. There was nothing to indicate that Mrs. Vanderbilt personally had any knowledge that plaintiff was an employee at all until after Fair's death, or that she personally knew anything about the alleged contract. It is not claimed by plaintiff that either Mr. Oelrichs or Mr. Fair did not act in perfect good faith in this matter, it being conceded that each of them fully intended to execute the written contract."

Upon the aforesaid facts the Supreme Court held that the defendants in the Seymour case were estopped from relying upon or pleading the statute of frauds.

There are three distinct differences in the facts of the Seymour case and the case at bar. The first is that in the Seymour case there was an express promise on the part of the defendant to reduce the contract to writing. There is no such express promise on the part of the defendant in this case. The second difference arises from the fact that in the discussion of the Seymour case it was assumed *"of course that Mr. Oelrichs was duly authorized in writing to enter into such a contract on behalf of the defendant as is alleged to have been made by him with plaintiff."*

Referring to the records in this case it will be seen that there is no authority proven on the part of witness Hellman to enter into any contract for the defendant herein. (See discussion in this brief under a of subdivision 2 hereof.) There is likewise no showing that Harry Lieb had any authority to bind the defendant in the contract which it is alleged he made with plaintiff. The pleadings show that the defendant is a corporation. There is absolutely no testimony in the record that fixes any authority in Harry Lieb for any purpose, with the exception of the three following statements quoted from the transcript. Witness Davis says (Trans. p. 8), "While there, I heard Mr. Harry Lieb, *the managing head of that company*, conduct a conversation over the telephone with Sidney L. Hellman." Witness Hellman says (Trans. p. 12): "I purchased this whiskey in the following manner: I spoke to Mr. Lieb, *who was the manager of the Sherwood business*, at Los Angeles. . . ." Again witness Hellman says (Trans. p. 13): "*Mr. Lieb was representing the Sherwood & Sherwood Commercial Company, of Los Angeles, in this transaction.*"

There is not one word in the foregoing excerpts from the transcript which would in any way show the authority of Harry Lieb to bind the defendant herein, and therefore the very basic assumption in the discussion of *Seymour vs. Oelrichs* is non-existent in the record in this case.

There is a third ground of distinction between the Seymour case and the case at bar, and this is a very important distinction. In the Seymour case knowledge of the change of personal status and position of Seymour was brought home to the defendants. They promised to enter into a contract in writing, with a full knowledge that Seymour would irrevocably lose his position as captain of police in the city and county of San Francisco by accepting their offer. There is not one word in the transcript in the case at bar which shows that any knowledge was brought home to defendant herein of any intention on the part of the plaintiff to change his position or to re-sell the whiskey which it is alleged defendant had sold plaintiff. We shall show by the authorities that it is absolutely essential before the elements of estoppel can operate, that knowledge shall be brought home to the party estopped of the change in position or intended change in position on the part of the party who asserts the estoppel.

The Supreme Court had under consideration a case on hearing after a decision by the District Court of Appeals. The facts of the case were that a certain contractor who held a contract with the United States Government to carry the mail, had made an arrangement with another contractor whereby the second contractor was to assume the obligations of the first contractor with the United States Government. The agreement was not reduced to writing. The second contractor assumed the ob-

ligations of the contract with the United States Government and commenced performance thereof. After beginning performance the first contractor sold and disposed of his equipment, such as horses, vehicles, etc., and left Lassen County, wherein the contract was to be performed. Thereupon the second contractor failed to perform the contract with the Government, and the first contractor was called upon at great damage to himself to return to Lassen County, purchase new equipment and perform the mail contract. The District Court of Appeal held that the acts occasioned by the breach of the contract upon the part of the second contractor amounted to an estoppel within the doctrine of *Seymour vs. Oelrichs*, and prevented the plea of the statute of frauds. The Supreme Court, however, upon hearing after judgment in the District Court of Appeal, refused to accede to this position, and uses the following language in connection therewith:

“In the District Court of Appeal it was held that the circumstances of the case were such that the defendants were estopped to set up the invalidity of the contract. This was based chiefly on the authority of *Seymour vs. Oelrichs*, 156 Cal. 793 (134 Am. St. Rep. 154, 106 Pac. 88). There are essential points in which the facts of that case differ from those in the case at bar. There Seymour was employed in a position for life at a good salary. This fact was *known* to the other parties and they orally agreed to employ him for a larger salary for ten years and to execute a written agreement to that effect, and they asked him to give up his life position at once and enter their service

under said agreement, which he accordingly did. He was thereby induced by them to change his condition by resigning his former position in reliance upon their agreement and promise. Their *knowledge* of the necessity of his resignation if he entered their service, and of his reliance upon their agreement as an inducement to resign, were held to be essential to the creation of an estoppel preventing them from repudiating their oral agreement and justifying the Court in enforcing it. In the case at bar, it is not alleged that it was necessary for plaintiffs or either of them to leave Susanville when they ceased to carry the mails, or that they informed defendants that they intended to change their residence or condition in any respect because of the proposed transfer, *or that the defendants had knowledge* of any such necessity or purpose. There is no evidence tending to show these facts, supposing them to have been pleaded, except the testimony of J. C. Long that he told the defendants before making the oral agreement that he had to go away because of his wife's health, and that after the agreement was made they sold two rigs and four horses and took the other equipment away 'on the strength of the agreement that we made with the defendants.' He did not say that the defendants were informed at the time of making the agreement that they intended to do this, or that they at that time had such intention, or that J. C. Long would not have gone away for the sake of his wife's health even if they had not made the agreement. There is, therefore, nothing upon which the supposed estoppel can rest."

Long vs. Long, 162 Cal. 427, 432.

It will be noted that the distinction between the *Seymour* case and the *Long* case is clearly based

upon the fact that in one case knowledge was brought home to the party pleading the statute of frauds, while in the other case, knowledge was not brought home.

The Appellate Courts of the State of California and of other jurisdictions have frequently commented upon the decision in *Seymour vs. Oelrichs*, and in many of the cases have stated the substance of the findings therein. We shall quote a few of these decisions for the purpose of illustrating the construction that the courts have placed upon the case cited.

“The appellant strongly relies on the case of *Seymour vs. Oelrichs*, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154. In that case the plaintiff Seymour sued for damages for breach of a contract of employment; his employment to cover a period of ten years. The contract was not in writing, and therefore void under the statute of frauds. The claim of estoppel was based upon the ground that the defendants when negotiating for his employment promised him a written contract, and had induced him, in order to permit him to accept the employment, to resign a life position carrying a good salary with a right to a pension upon retirement. Through circumstances arising subsequent to his entering upon his employment the written contract was not given to Seymour, and after rendering services under the verbal contract for a period of three years, he was dismissed. In holding the defendants estopped to set up the statute of frauds the Supreme Court laid emphasis upon the fact that it was not because of the rendition of services under

the contract that the estoppel was allowed, but because of the change of position suffered by the plaintiff through having resigned a lucrative position—and which he could not now regain—in order to accept the employment. It was held that it would be a fraud upon the plaintiff if the defendants after having induced him to resign from his position upon the promise of a ten-year written contract, and having failed to reduce the contract to writing, were permitted to set up the invalidity of the oral contract to defeat recovery.”

Sellers vs. Solway Land Co., 31 Cal. App. 268, 160 Pac. 175, 179.

The District Court of Appeal of the State of California in and for the second appellate district had before it in two separate hearings a case which very distinctly indicates where a line should be drawn in interpreting *Seymour vs. Oelrichs*. The first report of the case is found in 28 California Appellate Decisions at page 1219. Subsequently a rehearing was granted by the same Court and the final report of the case is found in 29 Cal. App. Dec. 778, and 184 Pac. 955. The title of the case is *Standing vs. Morosco*. The case involved a contract of employment for a period of more than one year. The plaintiff was an actor in the city of New York. He gave up his employment, sold his home and his furnishings in New York, and removed with his family to the city of Los Angeles, to accept employment from the defendant at Los Angeles. He acted upon a memorandum of a contract which the Court held to be invalid. The ques-

tion was presented to the Court as to whether there was an estoppel under the principle of *Seymour vs. Oelrichs*. The Court says in reference to the defense as follows:

“In order to avoid the effect of the statute, it is appellant’s position that there was such part performance of the contract shown as to raise an estoppel against respondent, preventing him from questioning the validity of the contract or its enforceability. The rule referred to is an equitable one, which holds it to be a fraud under some circumstances to permit a party to make the defense that a contract is void or unenforceable because not in writing. Every person is advised of the plain requirement of the statute, and the mere omission to insist that a writing be made, or reliance upon the unfulfilled promise of the other to put the agreement in writing, is not sufficient to protect the party insisting upon the fulfillment of the alleged contractual obligation. He must be misled by the other to his prejudice; not only must sufficient facts appear to show a representation (by words or conduct) on the part of the defendant that he did not intend to resort to a plea of the statute, but the other party must have so altered his position as that he would be made to suffer loss or unconscionable injury. If no such injury or loss is shown, the reason for the rule of estoppel fails and the excepted case is not established. See *Browne on Statute of Frauds* (5th Ed.) 457; *Glass vs. Hulbert*, 102 Mass. 24, 2 Am. Rep. 408—both cited in *Seymour vs. Oelrichs*, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154.”

¹*Standing vs. Morosco*, 29 Cal. App. Dec. 778; 184 Pac. 955.

The Supreme Court of Nevada had before it on original hearing reported 184 Pacific 212 and on rehearing 185 Pacific 563, the case of *Nehls vs. William Stock Farming Co.*, in which there was a claim that because of certain expenditures of money on the part of the party against whom the statute of frauds had been raised, the opposing party was estopped from pleading the statute. This expenditure of money was held by the Supreme Court of Nevada, not to constitute an estoppel within the rules laid down in the *Seymour* case. We quote from the comments of the Court in the original hearing:

“But counsel for respondent strenuously contend that the defendant should be estopped from pleading and urging the statute of frauds, and rely upon the case of *Seymour vs. Oelrichs*, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154. That was a case in which Seymour, who had a life position as captain of detectives in San Francisco, at a monthly salary of \$250, entered into an oral agreement with the defendants whereby he was to resign as captain of detectives and accept a position with them for ten years at a monthly salary of \$300. The defendants repudiating the contract, Seymour brought suit. The defendants pleaded the statute of frauds. The Court held that because of the fact that Seymour had been induced to give up his life position, to which he could not be reinstated, defendants’ refusal to comply with the verbal agreement operated as a fraud upon the plaintiff, and sustained the plea of estoppel. The Court said:” (Here the Court quotes *in extenso* from the the *Seymour* case.)

Nehls vs. William Stock Farming Co., 184
Pac. 212, 213.

It is very apparent from the authorities quoted above that the principle of an estoppel cannot operate in this case. The facts relied upon by plaintiff as proving an estoppel are only facts that amount to a breach of a contract if it were a valid contract. To adopt the position contended for by plaintiff would be to repeal the entire statute of frauds, for all that a person need do to obviate the statute of frauds would be to make a re-sale of the personal property supposed to have been purchased under the oral contract immediately upon the closing of the alleged oral contract. In effect the frauds and perjuries against which the statute was enacted would be brought into our courts without any let or hindrance if the theory of plaintiff were to prevail therein.

CONCLUSION

To briefly summarize, defendant has shown that the statute of frauds is an issue in the case under the pleadings. That Exhibits 1, 2 and 3 do not, either jointly or severally, constitute a valid memorandum under the statute. That this proposition is true,

(a) Because the authority of the agent to execute the memorandum was not in writing, as required by Section 2309 of the Civil Code.

(c) That the Exhibit Number 3 does not comply with the requirements of a valid memorandum under the statute.

That the defendant is not estopped under the doctrine of the case of *Seymour vs. Oelrichs* (156 Cal. 782) from pleading the statute of frauds.

We respectfully submit, therefore, that the trial Court was correct in his decision of non suit, and that Your Honorable Court should affirm the decision of the District Court herein.

Dated at San Francisco, California,
October 22, 1920.

Respectfully submitted,

LUCIUS L. SOLOMONS,

FRED C. PETERSON,

*Attorneys for Defendant
in Error.*

FRANK ORWITZ,
of Counsel.

No. 3545

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CINCINNATI DISTRIBUTING COMPANY

(a corporation),

Plaintiff in Error,

VS.

SHERWOOD & SHERWOOD COMMERCIAL CO.

(a corporation),

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

RICHARD S. GOLDMAN,

JOHN C. ALTMAN,

Attorneys for Plaintiff in Error.

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

Pursuant to permission granted by the Court at the oral argument of this case, counsel for plaintiff in error file this reply brief.

It is unnecessary to further consider the first point urged for a reversal of the judgment in this case, namely, that the telegrams passing between Mr. Hellman and the Cincinnati Distributing Co., taken together and in connection with the conversation between Mr. Hellman and the managing director of defendant authorizing Mr. Hellman to send the concluding telegram (Plaintiff's Exhibit 3),

constitute a sufficient memorandum of the transaction to take this case out of the operation of the statute of frauds. The record is before the Court and the rule respecting the character of such memorandum is discussed in the case of *Brewer v. Horst*, 127 Cal. 643, cited in our opening brief.

The second ground urged by plaintiff for a reversal of the judgment in this case is that defendant by its conduct is estopped to raise the statute of frauds as a defense to this action. In support of our position in this respect, we have relied chiefly upon the case of *Seymour v. Oelrichs*, 156 Cal. 782, which is quoted from extensively in both briefs previously filed. It has been contended by defendant that the rule established in the above case, namely, that a defendant is estopped to urge the statute of frauds as a defense to an action where such a defense would constitute a fraud upon the plaintiff, is inapplicable in the case at bar. The distinctions suggested are as follows:

(1) That it does not appear that the witness Hellman was authorized to enter into any contract with defendant.

(2) That the evidence is insufficient to show that Harry Lieb had authority to bind defendant to the contract here sued upon.

(3) That there is no evidence of knowledge on the part of defendant that plaintiff intended to change its position by reselling the whiskey at the time that the conversation between Hellman and Lieb took place.

The first point may be eliminated without discussion, because it is not contended that Mr. Hellman acted as the agent of the defendant in the execution of the contract in controversy. It is only urged that Mr. Hellman was authorized by Mr. Lieb to send the telegram which we contend takes the contract out of the operation of the statute of frauds. The contract itself was entered into between Hellman, acting for plaintiff, and Lieb for the defendant at the time of the telephone conversation referred to in our opening brief.

It is next contended by defendant that there is no showing that Harry Lieb had any authority to bind the defendant. However, counsel concede that the record contains the statement that Mr. Lieb was representing Sherwood & Sherwood Commercial Company in this transaction and that he was the manager or managing head of that company (see defendant's brief, page 24). Counsel's contention that this evidence is insufficient is based upon the proposition that Section 2309 of the Civil Code of the State of California requires that where the contract is required by law to be in writing, the authority of the agent making the contract must similarly be in writing. It has been held in a very recent case that this section of the Code does not apply to the executive officers of a corporation.

Arnold v. La Belle Oil Company, 32 Cal. App. Dec. 100.

The managing director of a corporation is, of course, an executive head. It was also held in the

case of *Newhall v. Joseph Levy Bag Co.*, 19 Cal. App. 9, that parol evidence was admissible to prove the authority of the secretary of a corporation, to enter into a contract on behalf of the corporation, even though the contract sued upon was one for the purchase of merchandise over the value of \$200, upon which no portion of the contract had been paid, nor any portion of the merchandise delivered, thus coming within the statute of frauds.

We beg further to direct the Court's attention to the fact that a contract of the character here sued upon is not required by law to be in writing in every instance. It is only where no portion of the merchandise has been delivered nor any portion of the contract price paid, that such contract is required to be in writing. The contract in question is one which arose in the ordinary course of business of the defendant corporation and under such circumstances, the following language of the District Court of Appeal of this State in the case of *Newhall v. Levy Bag Company*, supra, is particularly applicable:

“It is a matter of common knowledge that a very large part of the mercantile business of the country is, as a matter of convenience, if not, indeed, as a matter of necessity, carried on by corporate organizations. It would greatly hamper their usefulness if all the daily current purchases and sales of merchandise could be made only by resolution of directors or that the public dealing with their officers would do so at the peril of having their con-

tracts repudiated when they might happen to be unfavorable to the corporation or less profitable than anticipated when made."

The present case illustrates the application of this rule. It is an attempt on the part of the defendant to repudiate the authority of its general manager when a contract made by him, apparently profitable at the time it was executed, proved less profitable by reason of the sudden and rapid advance of the merchandise sold. The record discloses that, though at the price at which Mr. Lieb offered this whiskey to plaintiff, his firm would have made a profit of about \$6,000 (Trans. page 9), the price of whiskey advanced from \$1.35 per gallon (the contract price with plaintiff) to \$1.85, within a period of two weeks (Trans. page 20). These figures indicate conclusively the reason why defendant now contends that its general manager was not authorized to make this contract on its behalf.

The final ground of distinction urged by defendant between this case and that of *Seymour v. Oelrichs*, is that in the latter case, defendant's agent knew that plaintiff as a result of his promise to reduce the contract to writing, resigned a position as captain of detectives in the City of San Francisco, which position he held for life at a salary of \$250 per month. In the instant case, there was no evidence that defendant knew that plaintiff intended to alter its position as a result of the oral

contract made by its general manager by reselling the whiskey.

There is only one conclusion which can be reached from the testimony in this case as to the purpose for which plaintiff purchased this whiskey, and that is that is purchased it for resale.

Hellman stated that the only business in which plaintiff was engaged was that of whiskey broker (Trans. page 12). A broker is one who is engaged in the purchase and sale of merchandise on a commission basis, and it is a matter of common knowledge, which must be imputed to defendant, that when a broker purchases merchandise outright in his own name, it is for the purpose of immediate resale, if indeed a contract for its resale has not been entered into prior to its purchase.

If plaintiff was not buying this whiskey for the purpose of resale, we might aptly ask counsel, for what purpose their clients believed that plaintiff was purchasing 198 barrels of whiskey. As further evidence of the fact that Mr. Lieb knew that plaintiff was purchasing this whiskey for resale, we beg to direct attention to a letter written by him to Mr. Hellman (Plaintiff's Exhibit 6), in which he states:

“The motto of this communication is do not *sell* what you have not purchased or what has not been sold to you.”

This contract was written shortly after the conversation between Mr. Hellman and Mr. Lieb,

which we claim furnishes the basis of this transaction, and was the letter in which Mr. Lieb denied the execution of the contract which he entered into. In this same communication, Lieb very frankly expresses the reason why his company refused to deliver the whiskey to plaintiff. To quote his own language

“To be candid and truthful, we have sold the whiskey at a much higher price than that which you offered.”

It is respectfully submitted that this case contains every element of an estoppel to deny the statute of frauds suggested in the case of *Seymour v. Oelrichs*: First, we have an oral promise on the part of defendant to deliver merchandise to plaintiff at an agreed price; we have the statement of defendant's managing director that an invoice for the merchandise, together with warehouse receipt for the same, would be forwarded at once to plaintiff; we have the testimony of the president of the plaintiff corporation that immediately upon receiving information of the purchase of this merchandise and acting and relying upon defendant's promise to deliver the same, he contracted to sell the same amount of merchandise to another company. Then follows the repudiation of the contract by defendant after the goods had advanced in price. We next find that plaintiff, by reason of said repudiation, was compelled to and did purchase sufficient whiskey to comply with its contract of resale, at an advanced price, to its damage in a sum in excess of \$5,000.

By reason of the foregoing facts, all of which appear undisputed upon the record, we respectfully submit that the trial Court erred in granting defendant's motion for a non-suit and that the writ of error herein should be granted.

Dated, San Francisco,
November 6, 1920.

RICHARD S. GOLDMAN,
JOHN C. ALTMAN,
Attorneys for Plaintiff in Error.

